No. 208

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968, NO. 208

AMERICAN OPTICAL COMPANY, C'BON, INC. AND COOL-RAY, INC.,
Plaintiffs-Appellees,

v.

RAYEX CORPORATION AND MONACO OPTICAL CORPORATION,
Defendants-Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the United States Court of Appeals
For the Second Circuit

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IN THE

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AMERICAN OPTICAL COMPANY, C'BON, INC., AND COOL-RAY, INC.,
Plaintiffs-Appellees,

vs.

RAYEX CORPORATION AND MONACO OPTICAL CORPORATION,
Defendants-Appellants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on April 26, 1968, rehearing denied May 20, 1968.

Opinions Below

The opinion of June 28, 1966 of the District Court for the Southern District of New York granting plaintiffs' motion for a preliminary injunction is reported in 266 F.Supp. 342. The opinion of that Court, of April 26, 1967, refusing to vacate the preliminary injunction and holding defendants in contempt, is reported only in 153 USPQ 616. The opinion of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court in the 1967 proceeding, is reported only in 157 USPQ 465. These three opinions, together with the order of the District Court appealed from, are appended hereto, (*post*, pp. 17, 22, 43, and 44).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 26, 1968 and defendants petition for rehearing was denied on May 20, 1968. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

Questions Presented

1. Where a preliminary injunction has issued against a party, does not that party have the lawful right either to appeal, or to have that order vacated because of newly presented evidence showing that the injunction has been improvidently granted?

2. In proceedings to vacate a preliminary injunction order, and in the absence of an appeal, does not the moving party have the right to produce all evidence, without regard to when it "occurred", or came into being, which shows the injunction was improvidently granted.

3. Does Section 43(a) of the Lanham Act give a right of action for "any false description or representation" in the absence of any misleading or deception as to the source of the thing described or represented?

4. Is it lawful to hold a party in contempt of a preliminary injunction order for failing to do something not required by the order?

Statutes Involved

Lanham Act § 43(a) (15 U.S.C. § 1125(a))

"(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending

falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

Title 28 United States Code, Section 1292(a)(1)

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

Statement of the Case

The action here is based on an alleged violation by defendants*, of Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)) (R. pp. 1-8). The District Court granted preliminary injunction (R. pp. 63-69, 73-77). Later, after a complete development of the facts by deposition, the matter came again before the District Court on defendants'

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* American Optical Company, C'Bon, Inc. and Cool Ray, Inc. will be referred to as "plaintiffs"; Rayex Corporation and Monaco Optical Corporation as "defendants". The record will employ the pagination given in the Court of Appeals and will be cited "R. ". Italics or brackets within quotes are ours, unless the contrary is indicated.

motion to vacate the injunction and on plaintiffs' motion for contempt (R. pp. 178, 235-236, 1667-1702). The Court granted plaintiffs' and denied defendants' motions, and defendants appealed R. p. 1722).

At the inception of the argument in the Court of Appeals, that Court, in apparent disregard of 28 U. S. C., Section 1292(a), attacked the right of defendant to appeal.

That Court's opinion, announced two days later, does not refer to the propriety or legality of the appeal and it doesn't contain a suggestion that the merits were considered. Instead—though its phraseology is not entirely clear—its affirmance of the lower court seems to be based on the grounds that the defendant had not appealed from the preliminary injunction order, that defendants' motion "was not based on changes in circumstances which occurred after the injunction was entered",* and that defendants were "merely trying to relitigate on a fuller record preliminary injunction issues already decided by Judge Tenney" (*post* p. 43).

Though not reached by the Court of Appeals, the record here shows that plaintiffs, in June 1966, brought their complaint asserting that defendant, Rayex, in a catalog advertising its skiglasses, had used a photograph of a pair of plaintiffs' sunglasses, called Camelot, to advertise its own skiglasses called Alpine, in violation of Section 43(a) of the Lanham Act (R. pp. 1-8). The matter was heard six days later. The defendants, unprepared, made an incomplete and ineffectual defense and the Court granted a preliminary injunction (R. pp. 17-18, 55-56, 63-69, 73-77).

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* The expression "changes in circumstances" is highly ambiguous. Counsel for defendants was asked whether the facts relied on had occurred, or come into being, after the preliminary injunction hearing, and the concession to which the opinion refers was that they had come into being before that hearing, but had not been before the Court at that time and had only been brought into the record at the time of the hearing on the motion to vacate.

Shortly after the grant of the injunction, defendants examined three of plaintiffs' witnesses on deposition and showed by their admissions that material facts, produced by plaintiffs and relied on by the lower court in granting the injunction, were basically inaccurate and misleading. Defendants thereafter took the depositions of all other parties believed to have pertinent knowledge to show that defendants had never violated Section 43(a). The record thus made—with full exercise of the right of cross-examination—was so comprehensive that the District Court spoke of "treating this as a trial" and added that his findings "would be *res judicata*" and "binding on the parties" (R. pp. 1810-1811).

The decision of the District Court on the motions for contempt and to vacate (*post*, pp. 22-42), shows

(a) that, with respect to the motion to vacate, § 43(a) was construed as creating a cause of action where there was "any false description or representation" (*post*, pp. 33-34, 41, n. 6), even though there was no proof in the record that the challenged photograph was known to or recognized by the public, or that it indicated any source, or that plaintiffs were in any way injured, or that any member of the public was confused or deceived, and even though the record here showed that defendants did not use a photograph of plaintiffs' glasses; and

(b) that with respect to the motion for contempt, the Court refused to give the slightest effect to defendants' evidence, it ignored the heavy burden of proof resting on plaintiffs (*post*, p. 24), and it held defendants in contempt for not taking action which the injunction order did not require them to take (*post*, pp. 25, 27); and

(c) that, the Court's conclusions, both with respect to the motion to vacate and the motion for contempt, seems to have been induced, at least to some degree, by the fact that, though defendants' case was vouched for by the admissions of three witnesses

connected with plaintiffs, and by the testimony of five entirely unimpeached and uncontradicted witnesses connected with defendants, together with an array of documentary and physical evidence, the controlling preconception of the Court was that defendants were guilty and that their entire case was "untrustworthy" (*post,* p. 24), and "not worthy of belief" (*post,* p. 26), and "a fabrication" (*post,* p. 35).

Reasons for Granting the Writ

(1) The Court of Appeals, in holding that a party, to secure relief from a preliminary injunction, must appeal or go to trial on the merits, is in square conflict with the decision of this Court in *United States* v. *U. S. Smelting Co.,* 339 U. S. 186 (1950); and with the Court of Appeals for the Ninth Circuit in *Tanner Motor Livery, Ltd.* v. *Avis, Inc.,* 316 F.2d 804 (1963), cert. denied 375 U. S. 821 (1963).

(2) The Court of Appeals, in holding that a party, to secure relief from a preliminary injunction, could rely only upon "changes in circumstances which occurred", that is, facts which arose or came into being, "after the injunction was entered", and could not "relitigate on a fuller record preliminary injunction issues already decided", is in square conflict with the decisions of this Court in *Marconi Wireless Co.* v. *U. S.,* 320 U. S. 1 (1943); *Drivers Union* v. *Meadowmoor Co.,* 312 U. S. 287 (1941); and *Simmons Co.* v. *Grier Bros. Co.,* 258 U. S. 82 (1922), and with the decisions of the First Circuit in *Bailey* v. *Proctor,* 166 F.2d 392, 395 (1948); the Fourth Circuit in *Webster Motor Car Company* v. *Zell Motor Car Company,* 234 F.2d 616 (1956); the Seventh Circuit in *Fidelity Trust Co.* v. *Board of Education,* 174 F.2d 642, 645 (1949); the Ninth Circuit in *Castner* v. *First National Bank of Anchorage,* 278 F.2d 376 (1960); the Tenth Circuit in *Houston Fearless Corporation* v. *Teter,* 313 F.2d 91, 92 (1962); and the District of Columbia Circuit in *Schoen* v. *Washington Post,* 246 F.2d 670, 673 (1957).

(3) The Court of Appeals, in affirming the District Court's refusal to vacate the injunction, put its stamp of approval on a decision construing Section 43(a) of the Lanham Act in a way which is in direct conflict with the decisions of the First Circuit in *Samson Crane Co.* v. *Union Nat. Sales,* 87 F.Supp. 218 (D. Mass. 1949), affirmed on the District Court opinion 180 F.2d 896 (1950); the Seventh Circuit in *Hesmer Foods, Inc.* v. *Campbell Soup Company,* 346 F.2d 356, 359, cert. denied 382 U. S. 839 (1965); the Ninth Circuit in *Chamberlain* v. *Columbia Pictures Corp.,* 186 F.2d 923 (1951); and the District of Columbia Circuit in *Gold Seal Company* v. *Weeks,* 129 F.Supp. 928, 939-940 (D. D. C. 1955), affirmed "for the reasons given" by the lower court, *sub nom S. C. Johnson & Son, Inc.* v. *Gold Seal Company et al.,* 230 F.2d 832 (1956), cert. denied 352 U. S. 829 (1956).

(4) The Court of Appeals, in affirming the District Court's holding that defendants were in contempt for failing to do something which the injunction order did not command it to do is in direct conflict with this Court's decisions in *Terminal R.R. Assn.* v. *U. S.,* 266 U. S. 17 (1924); *Longshoremen* v. *Marine Trade Assn.,* 389 U. S. 64 (1967); and with Rule 65(d) of the Federal Rules of Civil Procedure.

Argument

(1) The Court of Appeals, in its opinion here, said

> "Appellants took no appeal from that order. Instead of seeking to obtain 'a trial of the action on the merits', see Rule 65, Fed. R. Civ. P., appellants attempted four and one-half months later to have the preliminary injunction vacated despite their earlier failure to appeal" (*post,* p. 43).

Rule 65, in subparagraph (a)(2), allows the court "Before or after the commencement of the [preliminary injunction] hearing" to order trial advanced and consolidated

with the injunction hearing. It has no application to a situation arising after the injunction has been granted, and it does not even suggest that a trial on the merits is the only alternative to appeal. And that it is not, is entirely clear from this Court's opinion in the *U. S. Smelting* case (*ante*, p. 6).

That case was concerned with a failure to appeal under 28 U. S. C. § 1253, rather than Section 1292(a), as here. Section 1253 allows an appeal from a three judge court "granting or denying . . . an interlocutory . . . injunction". While Sections 1253 and 1292(a)(1) address themselves to different situations, the congressional intent clearly was the same in both cases—to give the right of appeal from an interlocutory injunction.

In the *U.S. Smelting* case the District Court reversed the Interstate Commerce Commission, granting a preliminary injunction and returning the matter to the Commission. The appellant did not appeal from the grant of the preliminary injunction, but after further proceedings, appeal was taken. The appellee urged that, because there had been no appeal from the preliminary injunction, it became "the law of the case" (339 U.S. 198). This Court disagreed. With respect to the effect of not appealing, this Court said:

> "The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, nothwithstanding its interlocutory character, had made it appealable. 28 U.S.C. § 1253. The appellants might have appealed, but they were not bound to" (339 U.S. 198-199).

The rationale of this statement applies with equal force to matters arising under Section 1292(a)(1), and the parallel between that and this case is apparent. In both cases action had been taken from which the law allowed an appeal, but the parties aggrieved "were not bound to [appeal]".

The *U.S. Smelting* opinion also brings out the fact—of significance here—that after the first remand the "whole proceeding. . . was *in fieri*", and that "The Commission had a right on reconsideration to make a new record" (339 U.S. 198).

In the *Tanner* case (*ante* p. 6), the Court construed Section 1292(a)(1) in the same way this Court construed Section 1253 in the *U.S. Smelting* case.

One District Court judge in the *Tanner* case granted a preliminary injunction from which no appeal was taken. Subsequently a second judge dissolved the first injunction and granted another, and appeal was taken. The Court of Appeals referred to its earlier decision in the *Castner* case (*ante* p. 6) as simply an application

> "of the well-established rule that a district judge always has the power to modify or to overturn an interlocutory order or decision while it remains interlocutory" (316 F.2d 809).

Then, coming to the question of appeal, the Court further said

> "An order granting or denying a preliminary injunction is made appealable, as of right, by statute. (28 U.S.C. § 1292(a)(1)) . . . This does not mean that an order granting a preliminary injunction cannot be reconsidered by the district court if an appeal is not taken" (316 F.2d 809-810).

Jones Bros. Co. v. *Underkoffler*, 24 F. Supp. 393 (M.D. Pa. 1938), is to the same effect.

In the *U.S. Smelting* case this Court spoke of "reconsideration"; in the *Tanner* case the Ninth Circuit, referring to the right of a court to correct its earlier action, used the expression "the power to modify or to overturn" and "reconsidered". None of these expressions is equivalent to or compatible with a trial on the merits. And neither these cases nor the cases, upholding the right of a district court to reconsider its preliminary injunction order (*ante* p. 6;

post, pp. 10-11), has ever suggested any limitation on the mechanics by which reconsideration might be best achieved.

(2) The Court of Appeals noted that defendant's concession that its motion to vacate "was not based on changes in circumstances which occurred after the injunction was entered", and that

> "It is clear that by their cross-motion appellants were merely trying to relitigate on a fuller record preliminary injunction issues already decided by Judge Tenney" (*post* p. 43).

But this Court's decisions make it plain that a party, on such a motion, is not limited to facts arising after the injunction and that there may be such further proceedings as will adequately show that the injunction was granted under a basic misapprehension as to the facts.

In the *Marconi* case (*ante* p. 6), the Government asked for a particular finding which had the effect of requiring reconsideration of an earlier decision of the lower court. This requested finding was based, at least in part, on evidence which had not been before the court at the time of its earlier decision (320 U. S. 46-47). The lower court rejected this request, but this Court held that was error, saying

> "the court did not lack power at any time prior to entry of its final judgment at the close of the accounting to reconsider any portion of its decision and reopen any part of the case. *Perkins* v. *Fourniquet*, 6 How. 206, 208; *McGourkey* v. *Toledo & Ohio Central Ry. Co.*, 146 U. S. 536, 544, *Simmons Co.* v. *Grier Bros. Co.*, *supra*, 90-91. It was free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to reopen the case for further evidence" (320 U. S. 47-48).

The Court of Appeals decision in this case cannot be reconciled with the *Marconi* decision, either as to the type of evidence to be used or as to the nature of the "reconsideration".

The concept of limiting consideration to events occurring after the original injunction has its only reason for being in cases like *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). There, the question was whether the Court would vacate or modify a permanent injunction, which, as of the date of its entry, was sound and unassailable, and as to which the relief sought was based solely on events occurring after the injunction (286 U. S. 111-113). Here the facts are at opposite poles to those in the *Swift* case. Here the injunction was preliminary and not permanent and here the injunction was prompted by facts which, it now is admitted, were basically inaccurate. The *Swift* case is entirely inapposite here.

The guiding principle of all of the cases holding that the basis for a preliminary injunction may be reconsidered is that the injunction "is no longer warranted" (the *Drivers Union* case, 312 U. S. 298); or that revision is "consonant with equity" (the *Simmons* case 258 U.S. 91). No case has hobbled the rule, as did the Court of Appeals here, by making an earlier decision an iron curtain which, whether right or wrong, could not be penetrated.

(3) The lower Court held that a case was made out under Section 43(a) of the Lanham Act by what it considered proof of a "false description or representation", without anything more.

The Court of Appeals, by affirming, has ratified and confirmed that decision.

Section 43(a), a broadening of Section 3 of the Trademark Act of 1920 (Act of March 19, 1920, c. 104, § 3, 41 Stat. 534), gives a cause of action to "any person who believes that he is or is likely to be damaged" by another "who shall . . . use in connection with any goods . . . a false designation of origin, or any false description or representation, including . . . symbols tending falsely to . . . represent the same [goods]" (*ante* pp. 2-3).

It seems to be generally agreed that the section creates a new right of action (the *Samson* case, *ante* p. 7, 87

F.Supp. 222; *Federal-Mogul-Bower Bearings, Inc. v. Azoff*, 313 F.2d 405, 409-410; the *Gold Seal* case, *ante* p. 7, 129 F. Supp. 939-940), but the courts are not in agreement as to the breadth of the right. This conflict might well be resolved by this Court, which, up to now, has not considered Section 43(a).

That section is a part of the Lanham Act and the Lanham Act, according to the final paragraph of Section 45 (15 U. S. C. § 1127), relates primarily to trademarks and, to a lesser degree, to unfair competition (see also Report of Senate Committee on Patents, No. 1333, of May 14, 1946, on H. R. 1654 (U. S. Code Congressional Service 1946, pp. 1274-1278)). It is only reasonable, therefore, to analogize the cause of action given by Section 43(a) to actions for trademark infringement or unfair competition. And many of the cases have so held. Thus, in the *Samson* case, the court said

> "The language of Section 43(a) is broad enough to include practices of this latter class [that is, other forms of misrepresentations having the general character of trademarks]. But the section should be construed to include only such false descriptions or representations as are of substantially the same economic nature as those which involve infringement or other improper use of trade-marks. It should not be interpreted so as to bring within its scope any kind of undesirable business practice which involves deception, when such practices are outside the field of the trade-mark laws, and especially when such undesirable practices are already the subject of other Congressional legislation, such as the Federal Trade Commission Act (87 F. Supp. 222).

To the same effect, the Ninth Circuit, in the *Chamberlain* case (*ante* p. 7), said

> "However, we do not think said section [15 U. S. C. § 1125(a)] changes the fundamental requirements necessary to sustain a suit for unfair competition, one such requirement being a direct injury to the property rights of a complainant by passing off the particular goods or services misrepresented as those of complainant. Deceiving the public by fraudulent means, while an important factor in such a suit, does

> not give the right of action unless it results in the sale of the goods as those of the complainant'' (186 F. 2d 925).

The District Court here followed no such process of reasoning.

It refused to hold plaintiffs to the requirement of showing ''a false designation of origin'', saying

> ''to sustain a cause of action under § 43(a) of the Act, a plaintiff must allege *either* 'a false designation or origin, *or* any false description or representation' (Emphasis added [by the Court]) . . . 'Plaintiffs appear to have clearly brought themselves within the second alternative'' (*post,* p. 42, n. 6).

In so holding, the lower Court made it unnecessary for plaintiffs to prove anything beyond the bare fact that defendants were using a photograph of plaintiffs' Camelot glasses. And since the Court disregarded all of defendants' evidence, it did not require much proof to convince it that the photograph was of Camelot. But, as has been noted, there are no proofs here that plaintiffs' glasses, or a photograph of them, conveyed any message to or confused or deceived anyone (*ante,* p. 5).

Plaintiffs could make no such proofs. Camelot, by admission, first appeared in February 1965 (R. p. 580; see also p. 675), only five or six months before the distribution of the accused catalog of defendant, Rayex (R. pp. 859, 1170). Plaintiff showed no recognition of or demand for these glasses, and it refused to show the number of such glasses made or sold, or the area of distribution (R. pp. 675-677), and, at the time the accused catalog appeared, the public was as unconscious of and as indifferent to Camelot as it was to bricks, or shingles or any other anonymous commodity.

Under such circumstances, to hold that a valid cause of action has been shown, is to create, in Section 43(a), a far

more sweeping right than any given by the law of trademarks or of unfair competition. Thus, while an action either for trademark infringement or for unfair competition requires a misleading as to the origin or source or some form of passing off (*Canal Company* v. *Clark*, 80 U. S. 311, 323 (1871); *Sears Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225 (1964); *Compco Corp.* v. *Day Brite Lighting*, 376 U. S. 234 (1964)), an action under Section 43(a), construed as the lower court construed it, would require only a bare misrepresentation which might be of a meaningless detail which had mislead no one. Thus, that section would blanket the entire field of trademark and unfair competition law, without any requirement that there be deception or confusion as to origin, or any of the other basic preconditions required to satisfy those laws.

(4) The original preliminary injunction order required that defendants

> "Withdraw their Astro-Ski catalog . . . by mailing to all persons, firms, organizations and companies known or believed to possess a copy of same, a letter in the form annexed . . ." (R. p. 74).

The sole basis for the Court's holding of contempt was its belief that enough letters had not been sent.

The plaintiffs produced no evidence that any person who had a copy of the catalog did not get the letter called for by the order. The burden was on the plaintiffs, asserting the contempt, and that burden could be sustained only by clear and convincing evidence (*Oriel* v. *Russell*, 278 U. S. 358 (1929)).

But the District Court did not ask that plaintiffs produce any such evidence. Instead, the Court held defendants in contempt, apparently, because it felt that

> "a proper compliance with the 'spirit' of the injunction would have obliged defendants at least to attempt to have their wholesalers pass on the message to their respective customers" (*post*, p. 25).

And that

> "at least some effort should have been made to secure some action on the part of the distributor

> without revealing to whom he distributed, that the information would be passed on . . . if they [defendants] had sincerely intended to comply and not in just a superficial way comply with the order of the court, and even if their intentions were the best, I can hold them in civil contempt" (R. pp. 1774-1775; see also R. pp. 1781-1795).

However, while the injunction order plainly required defendants to send letters to persons, etc. "known or believed to possess a copy of [the catalog]", it, just as plainly, did not require defendants "to attempt to have their wholesalers pass on the message to their customers".

In the Terminal R.R. case (*ante* p. 7), it was said

> "In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought, and the facts found must constitute a plain violation of the decree so read" (266 U. S. 29).

Consistently with this decision, Rule 65(d), F. R. C. P., requires that an injunction "shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained".

The injunction here, in the words of this Court in the *Longshoremen's* case (*ante* p. 7),

> "clearly failed to comply with [Rule 65(d)], for it did not state in 'specific . . . terms' the acts that it required or prohibited" (389 U. S. 76).

Specifically, the order did not require defendants to "pass on the message" to the customers of defendants' customers.

The *Longshoremen's* case also makes it plain that defendants had no obligation to guess, under pain of contempt, what "the 'spirit' of the injunction" is. In that case, this Court said

> "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be

understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid'' (389 U. S. 76).

Conclusion

On the procedural question here involved, the decision of the Court of Appeals, in direct conflict with the decisions of this Court, has erected a barrier to the reconsideration by lower courts of improvidently granted preliminary injunctions. On the merits, the Court of Appeals, in affirming, has ratified and confirmed the lower Court's decision. which is in direct conflict with the decisions of at least four other circuits. And, in affirming the holding of contempt, which is based on defendant's failure to do something it was not required to do, the Court of Appeals again has brought itself into direct conflict with the decisions of this Court.

To bring the decision below into conformity with established law, this petition should be granted.

Respectfully submitted,

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APPENDIX

Opinion on Preliminary Injunction Proceeding (June 28, 1966)

[Reported in 266 F. Supp. 342]

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CHARLES H. TENNEY, D. J.

[63] This motion is to enjoin certain alleged activities of the defendants herein. Jurisdiction of the Court is based on Sections 39 and 43(a) of the Lanham Act, 15 U. S. C. §§ 1121, 1125(a), as well as diversity of citizenship.

The activity involved is the alleged use by defendants, in their sunglass catalogue, of a photograph of plaintiffs' higher quality sunglass in connection with sales of its(*) (defendants') inferior quality glass.

Plaintiff American Optical Company has, for the past twenty-five years, manufactured and sold sunglasses and lenses therefor. Plaintiff C'Bon, Inc. (herein- [64] after referred to as "C'Bon") is a wholly-owned subsidiary and was created in 1965 for the purpose of creating, promoting and selling a quality line of high-style sunglasses.

Defendants Rayex Corporation and Monaco Optical Corporation are also in the sunglass field, and while the sunglass products listed in the catalogue are primarily directed toward the ski enthusiast, I find sufficient relationship between the products of plaintiffs and defendants so that they are in competition. (A reading of plaintiffs' advertising material reveals a "year-round" appeal.)

Involved herein is plaintiff C'Bon's Camelot style sunglass (hereinafter "Camelot"), photographs as well as samples of which were submitted at the hearing. Camelot is an expensive ($17.50) wrap-around, year-round sunglass

(*) The catalogue is printed by the Rayex Corporation. Exhibit 5-b, the actual Alpine model, has "Monaco Optical" stamped on its price tag.

with distinctive styling and is averred to be the best selling line of C'Bon. Suffice it to say that it is a better quality sunglass than defendants' (the Alpine model sells for $9.95, and to the inexperienced eye its styling is not as chic and smooth as Camelot's).

In defendant Rayex Corporation's catalogue circulated in December of 1965, there appears a photograph of [65] sunglasses identified as its Alpine style No. 1011. It is this photograph upon which plaintiffs predicate the requested relief.

Section 43(a) of the Lanham Act in pertinent part provides:

> "(a) Any person who shall . . . use in connection with any goods . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods . . . to enter into commerce, and any person who shall with knowledge of the falsity of such . . . description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

There is no dispute that the items herein entered interstate commerce.

Plaintiffs contend that this picture of defendants' Alpine style No. 1011 is in fact a photograph of their Camelot style. A visual comparison of the catalogue picture with plaintiff's Exhibit 4-A and a comparison of plaintiffs' Exhibit 7 with plaintiffs' Exhibit 8-A reveals, at least in a prima facie manner, if not conclusively, that the catalogue picture is indeed a [66] photograph of the Camelot. The

affidavit of Mr. Agraz, a commercial photographer, his comparison of the various exhibits and his method of comparison are most persuasive and are in no way disspelled by counterbalancing evidence.[1]

Defendants, in opposition, assert that they never used a photograph of plaintiffs' sunglasses to sell their Alpine model (presumably in the catalogue); they further assert that they, independently of plaintiffs, produced a "handmade prototype" of their glasses, from which they photographed the picture in the catalogue. This prototype, however, has not been produced, nor has the photograph of the prototype that was turned over to the printer. There is no affidavit of Harvey Dressner, who photographed the prototype nor any affidavit of the printer. Accordingly, it is difficult on such an insufficient showing to credit defendants' story that a prototype ever existed. Indeed, the comparison of the photographs reveals that not only was the prototype, if it existed, "dimensionally the same as plaintiffs' Camelot glass" (Tunkel affidavit ¶3), but it must have been an exact replica. Absent some substantiation of this averment I am unable to accept its veracity on the within application.[2]

[67] Accordingly, I believe the evidence to be sufficient preliminarily to justify a finding that the catalogue photograph is the "Camelot", and that therefore defendants have committed a wrong[3] by using a photograph of plaintiffs' product to sell their own inferior quality product and indeed filing orders with models different from that pictured in the catalogue.

Initially, there was some question in my mind as to whether plaintiffs' application was precluded by laches. However, in supplemental papers plaintiffs have sufficiently shown due diligence in securing the requisite information so as to dispel this problem.

It also appears that defendants have prepared a new catalogue properly depicting the Alpine model. That such

is the case does not, of course, cure the present wrong, and while defendants may send out the other catalogue all copies of the catalogue involved herein should be forthwith withdrawn and not used.

All bills for orders filled up to this date are to segregated so that when the action is tried on the merits the Court will be able to more easily ascertain [68] the sales attributable to the catalogue. Orders *submitted* and filled *after* the new catalogue is circulated will not be enjoined but all orders filled within a sixty-day period from the date that the new catalogue is circulated are to be segregated as well. All orders as of this date which are not filled shall be enjoined and returned to the buyer, and no orders on the said Alpine model are to be filled until the new catalogue has been sent out and directions given to destroy the old catalogue.

The Court, however, will not enjoin the sale of the actual Alpine glasses properly denominated and pictured as such in a new catalogue, since the actual Alpine glasses (plaintiffs' Exhibit 5-A and 5-B) are not similar to the Camelot. (See Carlson Affidavit ¶3.)

The findings of fact and conclusions of law, as required by Rule 52(a), are contained herein.

Settle order along the lines of that settled in *Surrey, supra,* no later than 4:00 P.M., June 30, 1966, on one (1) day's notice, suggesting the amount of security under Rule 65(c).

Dated: New York, New York
June 28, 1966.

/s/ Charles H. Tenney
U. S. D. J.

Opinion on Preliminary Injunction Proceeding
(of June 28, 1966)

[69] FOOTNOTES

(1) Pg. 53a. The difference in lens color is irrelevant as the issue herein is whether defendants used plaintiffs' products (distinctive frame) in advertising their (defendants') product.

(2) Pg. 53a. Moreover, even accepting that which defendants state, they concede that their prototype was "dimensionally the same" as plaintiffs', that one of the European manufacturers stated that he was about to begin the manufacture of a glass of the "same style as the Camelot glass", and that defendants ordered 2,000 of these frames. Thus, coincidentally, since the prototype was dimensionally the same as the Camelot, and the order was for the Camelot frame, the photograph in the catalogue looks as if it is a photograph of the Camelot. However, while the advertised picture is either the Camelot itself or that which is identical to the Camelot, the Alpine sunglass that was ultimately sold to fill the order was dissimilar in certain obvious respects, both in overall visual impression and in specific detail. (See Carlson Affidavit ¶ 3.)

(3) Pg. 53a. See, e.g., *National Dynamics Corp.* v. *John Surrey, Ltd.*, 238 F. Supp. 422, 423 (S. D. N. Y. 1963) and cases therein cited; cf., *Mastro Plastics Corp.* v. *Emenee Indus. Inc.*, 16 App. Div. 2d 420, 228 N. Y. S. 2d 514 (1st Dep't), aff'd without opinion, 12 N. Y. 2d 826, 236 N. Y. S. 2d 347, 181 N. E. 2d 360 (1962) (Granting leave to replead under Section 43(a)), 19 App. Div. 2d 600, 240 N. Y. S. 2d 624 (1st Dep't 1963) (Mem.), aff'd without opinion, 14 N. Y. 2d 498, 248 N. Y. S. 2d 223 (1964); see generally, *Blazon, Inc.* v. *De Luxe Game Corp.*, 65 Civ. 697 at 17-23 (S. D. N. Y. 5/11/65, per Tenney, J.); see also *Glenn* v. *Advertising Publications, Inc.*, 148 U. S. P. Q. 645, 653-55 (S. D. N. Y. 3/2/66, per McLean, J.).

Opinion on Defendants' Motion to Vacate Preliminary Injunction, and Plaintiffs' Motion for Contempt (April 26, 1967)

[Reported only in 153 USPQ 616]

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

Opinion

CHARLES H. TENNEY, D. J.

[1667] On July 1, 1966, after a hearing had been held on plaintiffs' motion for a preliminary injunction, this Court ordered that the defendants be restrained and enjoined pending determination of the within action from continuing further activity and further ordered defendants to take certain affirmative steps, both of which directives will be more fully described hereinafter. See prior opinion in *American Optical Co.* v. *Rayex Corp.*, F. Supp. , 66 Civ. 1633, S. D. N. Y., June 28, 1966. Plaintiffs move to cite defendants for contempt for failure to comply with the aforementioned order, in response to which the defendants have cross-moved for vacation of the order.

[1668] This litigation involves the alleged use by defendants, in their ski-sunglass catalog, of a photograph of plaintiffs' higher quality sunglass in connection with sales of defendants' inferior quality glass.

Plaintiff American Optical Company (hereinafter referred to as "AO") is a leading manufacturer and seller of sunglasses and lenses. Plaintiff C'Bon, Inc. (hereinafter referred to as "C'Bon") is a wholly-owned subsidiary which was created in 1965 for the purpose of creating, promoting and selling a quality line of high-style sunglasses. Defendants Rayex Corporation (hereinafter referred to as "Rayex") and Monaco Optical Corporation (hereinafter referred to as "Monaco") are also in the sunglass field. The sunglass catalog in issue herein is primarily directed toward the ski enthusiast.[1]

In defendant Rayex' "Astro-Ski" catalog circulated during 1965-1966, a photograph of sunglasses appeared designated as Alpine style No. 1011. Plaintiffs contend that this picture of Alpine style No. 1011 is in [1669] fact a photograph of plaintiff C'Bon's "Camelot" style glass. Indeed, this Court, in its prior order, found that sufficient evidence had been submitted preliminarily to justify a finding that the catalog photograph was of the Camelot.

An order was entered on July 1, 1966, enjoining and restraining defendants *inter alia* from using a photograph of the Camelot to sell defendants' Alpine model; using such a photograph in defendants' catalogs and advertisements; circulating a catalog or advertisement which contained such photograph; and selling said Alpine model pursuant to orders received but not filled as of June 28, 1966 or pursuant to orders received after June 28, 1966 but prior to circulation of defendants' new catalog.

Additionally, defendants were ordered to withdraw their "Astro-Ski" ski-glass catalog "By mailing to all persons . . . known or believed to possess a copy of same, a letter in the form annexed as Exhibit A to this Order"; destroying all copies of said catalog in defendants' custody or control; and changing the designation [1670] of the 1011 Alpine. Defendants neither sought reargument nor appealed this decision.

PLAINTIFFS' MOTION TO PUNISH FOR CONTEMPT.

The basic argument presented by plaintiffs is that, although thousands of catalogs had been printed, only eleven so-called Exhibit A letters were circulated (if that many) and that these letters varied from the format of the letter designated by the Court as the letter to be used. Defendants contend that plaintiffs have failed to sustain their burden of proof that the injunction order was not complied with, and that the variation present in the letter allegedly sent was necessary as a matter of sound business judgment.

While it is fundamental law that a party seeking to punish his adversary for civil contempt must satisfy his

burden of proof by clear and convincing evidence, *Hart Schaffner & Marx* v. *Alexander's Dep't Stores, Inc.*, 341 F. 2d 101, 102-03 (2d Cir. 1965) (per curiam); *Stringfellow* v. *Haines*, 309 F. 2d 910, 912 (2d Cir. 1962), this Court is of the opinion, contrary [1671] to defendants' contention, that plaintiffs have more than amply sustained this burden, and that defendants' conduct has been in blatant disregard of the aforesaid preliminary injunction. The consistent manner in which defendants' "evidence" has disappeared*, the convenient appearance at this time of material evidence nowhere accounted for at the time of the prior hearing, the haphazard manner in which defendants have kept their business records, the inconsistencies in statements made by defendants' employees on oral deposition and the superficial manner in which defendants have attempted to explain away these inconsistencies lead the Court to believe that, both for the purposes of this motion and for defendants' cross-motion, the evidence and testimony submitted by defendants is untrustworthy.

Raymond Tunkel, president of defenants Rayex and Monaco, stated in his deposition dated August 15-16, 1966 that in full compliance with the abovementioned order eleven Exhibit A letters were sent to wholesale distributors. In his affidavit submitted in conjunction with last June's application for an injunction, Tunkel stated that "The printer delivered to RAYEX a single edition of [1672] *several thousand* copies of the ASTRO-SKI catalog in color, in mid-July, 1965." Tunkel Affidavit of June 13, 1966, at ¶14. (Emphasis added.) This "several thousand" turned out to be 15,250 copies, 9,000 of which were delivered to Rayex, New York, with the remaining catalogs being sent to Rayex, Canada, to Mail Pouch Tobacco Company, a distributor in the tobacco field, and Beconta, Inc., who was to be Rayex' exclusive distributor in the ski industry.

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* *E.g.*, the Alpine prototype and related documents and the Hallerman itinerary discussed *infra*.

When Tunkel allegedly wrote to the eleven wholesale distributors, he did not request that these distributors ask their customers to withdraw the catalogs sent to them nor did he seek customer lists from his distributors because they would have become "indignant" as a result of such a request and would have threatened to stop doing business with Rayex. Although I do not think the injunction order would have required the Rayex attempt to obtain customer lists from its wholesale distributors and thereby endanger customer relations, a proper compliance with the "spirit" of the injunction would have obliged defendants at least to attempt to have their wholesalers pass on the message [1673] to their respective customers. This was not done. See *Hollaner* v. *Hollander,* 318 F. 2d 818 (2d Cir.) (per curiam), cert. denied, 375 U. S. 831 (1963); *Cassidy* v. *Puett Elec. Starting Gate Corp.*, 182 F. 2d 604, 606 (4th Cir. 1950). In this case it would be more than simply complying with the "spirit" of the order since defendants were to notify *all* persons "known or believed to possess a copy of" the offending catalog.

Moreover, in paragraph 15 of the Tunkel affidavit of June 13, 1966, it was stated that "This edition [the Astro-Ski catalog in issue] was promptly sent out by mail *to wholesale distributors of our regular glasses,* as well as to an exclusive ski distributor [Beconta]." (Emphasis added.) In his deposition, Mr. Tunkel drastically limits this statement: "Immediately after receipt [from the printer], they were circulated *to those few people who I thought would be proper for this catalog.*" Tunkel Deposition of November 14-15, 1966, at 817. (Emphasis added.) The first Tunkel statement creates an impression that all or quite a few of the regular customers of Rayex had received such a catalog while the second statement negates any such connotation. [1674] The reason for the inconsistency is obvious: At the time the Tunkel affidavit was prepared, there was no necessity of showing any limitation in the pos-

sible number of distributed catalogs, but at the time of the Tunkel deposition such a need had arisen, for if the catalog had been sent to Rayex' regular customers why was a letter not sent to each of these customers directing the withdrawal of such catalog? Again, in the earlier Tunkel affidavit it is stated that certain changes were made in the 1011 Alpine but these changes were not reflected in the catalog picture because the catalog "had then already been *widely distributed.*" Tunkel Affidavit of June 13, 1966, at ¶19. Obviously, this does not jibe with Tunkel's limited distribution statement made on oral deposition in November of 1966 which has been set forth *supra.* I therefore conclude that Tunkel's later statement in his deposition, made at a time when he had a reason to falsify, is not worthy of belief.[2]

Accepting Tunkel's earlier statement that the catalog was sent to wholesale distributors of Rayex' regular sunglasses, it appears that Rayex reached between [1675] three and five thousand names on its Addressograph mailing list (Tunkel Deposition of November 14-15, 1966, at 866-67) rather than the approximately eleven names it claims were reached. Accordingly, it is my opinion that a minimum of three thousand letters should have been sent.

However, the word "minimum" must be stressed because further evidence leads me to believe that additional persons should have been contacted. Gordon Hallerman, the assistant sales manager of Rayex, stated on oral deposition that he had been on a number of selling trips during the months of September to December, 1965. During that period of time, he worked with Rayex sales representatives and called upon between 200-300 accounts. For those glasses that were not as yet available, sales were made by reference to the Astro-Ski catalog. Hallerman stated that at this time he and the sales representatives had the Astro-Ski catalog and that this was shown to prospective customers. Hallerman Deposition of November 8-9, 1966, at 403-04. Defendants contend that the major

portion of the Hallerman testimony [1676] is irrelevant because it refers to the regular sunglass business of Rayex rather than to the Astro-Ski line. However, in my opinion, while at best the record in some instances is unclear, with respect to the above-mentioned information it is perfectly apparent that Hallerman and the sales representatives had the disputed catalog in their possession and exhibited it to prospective customers in an attempt to induce sales.

Certainly, then, notice of withdrawal of the catalog should have been given to the sales representatives and some effort should have been made to have these sales representatives give notice to their customers to fully comply with the injunction. In this respect, it is interesting to note that Hallerman had an itinerary of his sales trips which has, according to him, been lost or destroyed. Taken alone, this factor would possibly be credible. However, when taken in conjunction with the complete lack of any documentation on the part of defendants as to which distributors had received the catalog and the completely lackadaisical manner in which records of the catalog mailing were kept, the Hallerman representation that no list of customers visited in the fall of 1965 was [1677] available, is suspect. In any event, no explanation has been given for the failure to notify defendants' sales representatives of this Court's decision.

Hallerman further testified that after the injunction had been granted,

> "Mr. Tunkel called a meeting of myself, Mr. Friedman [Rayex vice president in charge of sales] and a few other people and he asked us to sit down and think of all possible customers, the names of all customers that we could think of to whom we delivered the Alpine 1011. . . ." Hallerman Deposition of November 8-9, 1966 at 346-47.

"Well, as I said before, a group of us sat down and tried to decide the names of those customers that we were familiar with, people that we had either called on or people from whom we might have received a request, any sort of information we could come up with which would help us in determining the names of the customers, and we tossed many names around and we wrote them down.

When we felt that we had exhausted every name that we could think of, we then went to what we call our blue file. Our blue file is a record kept in alphabetical order of the customers to whom we shipped merchandise and any shipments made there would be a blue for those shipments and we went through every name that we had.

Many of them we did not, indeed, ship the 1011 Alpine, we had shipped other glasses, but we did, in fact come across a few names where we did make shipment." *Id.* at 347-48.

The foregoing statement appears to represent the sum total of the action allegedly taken by [1678] defendants to fully comply with paragraph 2A of this Court's injunction order.[3] Plaintiffs contend that the very least defendants should have done at this point was to pull the blue file card for every customer who received *any one* of the Astro-Ski products depicted in the offending catalog. The Rayex catalog set forth seven styles of sunglasses and two assortments or "package deals". Plaintiffs argue that purchasers of any of the six styles other than the 1011 Alpine and of the two assortments must have used the condemned catalog in making such purchase and therefore notice should have been given to these customers as well. Counsel for defendants admit that there is some merit to this argument but claim, if anything, that this was a matter of judgment. Transcript of hearing of January 18, 1967, at 35.

Ordinarily, I would concede that defendants' failure to follow plaintiffs' suggestion would be no more than a judgment error. However, in light of what has already been set forth herein, I find that this just one further example of defendants' cavalier attitude toward an order of this Court.[4]

[1679] One further observation is in order in light of the foregoing, Rayex admittedly received 9,000 copies of the condemned catalog which would have been a sufficient amount to distribute to all of the persons on its mailing list, to its sales representatives, and still make credible its statement that several thousand catalogs were destroyed. Rayex argues that ten wholesale customers could have received five hundred catalogs each and therefore all recipients were thus notified. Although, as noted, plaintiffs have a very substantial burden of proof on this contempt motion, it is my opinion that this burden has been adequately satisfied and the burden of going forward must shift to defendants at this point. No showing whatsoever has been made by Rayex with respect to the number of catalogs received by those persons to whom notice of the injunction was allegedly given. Here, again, defendants have no records to substantiate their argument.

The Exhibit A letter which was to be sent to defendants' distributors stated that "Our new ASTRO-SKI catalogue will be out shortly." The letter [1680] that was allegedly sent to the eleven distributors stated, "Our new Astro-Ski catalog covering the 1966-1967 season is herewith enclosed." Plaintiffs contend that defendants rushed through two hundred copies of the new catalog to soften the effect of the Court's order. Defendants claim that the catalog was needed for a sales meeting. An examination of this catalog and a comparison with a later run thereof reveal an imperfection in color of the earlier run and lend support to plaintiffs' claim that these were hurriedly prepared. However, I need not speculate as to the reason for the rushed preparation of the new catalog since the evidence of defendants'

contempt has been sufficiently set forth. Suffice it to say that, taking this allegation with all of plaintiffs' other evidence, it would appear that this was an attempt to soften the effect of the Court's order, and defendants' conduct in not seeking an order of this Court amending the Exhibit A letter appears questionable. However, under the circumstances, little weight need be given to this factor.

Rayex argues, first, that no facts have been adduced which would show that it failed to comply [1681] with the preliminary injunction order; second, that the catalog was obsolete and it was therefore believed that it would no longer be in anyone's possession; and, third, that compliance was as complete as possible since there was no mailing list for the ski-glass catalog.[5]

The first argument is without merit as has been demonstrated previously herein. The second argument immediately brings one question to mind: If it was believed that the catalog was not in anyone's possession, why was notice of the Court's order sent to anyone? Additionally, the fact that the catalog may have been nearing the end of its useful life does not establish that customers did not have copies of it which they still utilized to place orders from Rayex, especially in light of the fact that a new catalog had not as yet been issued. If the meeting to determine who was in possession of the condemned catalog in fact took place, from the deposition testimony of Tunkel and Hallerman it would appear that any discussion of obsolescence was an afterthought—an excuse for the failure [1682] to comply with the injunction. As plaintiffs correctly argue, "Defendants had no way of knowing whether or not catalog recipients had destroyed or discarded the catalog and the only way they could have complied with this Court's Order . . . would have been to advise all possible customers of this Court's Order." Plaintiffs' Reply Memorandum, at 2. The only conclusion that this Court can reach is that defendants' obsolescence argument is a further manifestation of their continued bad faith in complying with the clear terms of the

injunction. Finally, defendants' third argument is refuted by the Tunkel affidavit which stated that the catalog was circulated to Rayex' regular wholesale distributors.

Accordingly, based on all the evidence presented, the Court is firmly convinced that plaintiffs have overwhelmingly sustained their burden of proving defendants' contempt.

The Applicable Law and the Formulation of an Appropriate Remedy.

It is well established that defendants cannot now question the propriety of the injunction order since they neither appealed that order nor sought reargument. [1683] *Alemite Mfg. Corp.* v. *Staff*, 42 F. 2d 832 (2d Cir. 1930); see *Leighton* v. *Paramount Pictures Corp.*, 340 F. 2d 859 (2d Cir.), cert. denied, 381 U. S. 925 (1965). Thus the only issue facing this Court on plaintiffs' motion to punish for contempt is whether defendants have complied with the terms of the order and in particular paragraph 2A thereof. And, as has been hereinbefore set forth, this issue is determined adversely to defendants. Since defendants have failed to comply with the order, plaintiffs, as a matter of right, are entitled to have them held in civil contempt with only the manner of the punishment being within the Court's discretion. *E. Ingraham Co.* v. *Germanow*, 4 F. 2d 1002 (2d Cir. 1925); *In re Sylvester*, 41 F. 2d 231, 236 (S. D. N. Y. 1930).

On this motion to punish for contempt, plaintiffs seek attorney's fees, motion costs for both the contempt proceedings and for defendants' cross-motion and an enlargement of the injunction order to the extent of requiring defendants to discontinue all sales of the Alpine sunglass style. It is my opinion that plaintiffs should be awarded the first two items but not the last.

[1684] When counsel for plaintiffs informed newly-appointed defense counsel that they would seek to punish defendants for contempt, counsel for Rayex obtained an

agreement that the motion would be deferred "until the entire Rayex story was presented." In presenting the Rayex story, defendants intertwined the contempt issues with those concerning the motion to vacate. As will be developed *infra*, the presentation of this complete record more fully convinces me that the preliminary injunction was not improvidently granted and that defendants have merely employed tactics which appear to have been designed to divert the Court's attention from the contempt issue. Accordingly, defendants are ordered to compensate plaintiffs for their reasonable expenses incurred in presenting the contempt issue to the Court, *Parker* v. *United States*, 153 F. 2d 66, 71 (1st Cir. 1946); *Eustace* v. *Lynch*, 80 F. 2d 652, 656 (9th Cir. 1935); *Christensen Eng'r Co.* v. *Westinghouse Air Brake Co.*, 135 Fed. 774, 782 (2d Cir. 1905), and this compensation, of necessity, must include the expenses incident to defendants' cross-motions since both motions are interrelated and since plaintiffs properly used the deposition proceedings to investigate the suspected [1685] noncompliance with the Court's order. *Babee-Tenda Corp.* v. *Sharco Mfg. Co.*, 156 F. Supp. 582, 587 (S. D. N. Y. 1957).

Damages for civil contempt may not be arrived at by mere conjecture. *Id.* at 588. Accordingly, if the parties are unable to agree on the monies thus recoverable, they are to submit affidavits and the Court will make the necessary determination.

Plaintiffs' request for an enlargement of the scope of the injunction must be denied. Plaintiffs contend that the injunction as it stands at this time is totally ineffective since it has allowed defendants to enter the market unfairly. But plaintiffs do not dispute that only one further order for the 1011 Alpine was received from the date of the injunction to the time when the defendants' new catalog was circulated and this order was refused. The main purpose of the injunction was to create a hiatus in the defendants' sales obtained through use of an improper photograph and its sales engendered by fair business means. Whether

defendants have complied with the injunction is immaterial in this limited respect since it is apparent that a cooling-off period was affected, [1686] albeit not by reason of the Court's order.

Additionally, portions of the injunction order were meant to expire by their terms upon the circulation of defendants' new catalog without the offending photograph. Other portions, such as the change in designation of the glasses and the segregation of bills, orders and other shipping records, still remain in effect so that the injunction can by no means be considered moot. Accordingly, it is this Court's opinion that extending the scope of the injunction would be an abuse of discretion and that plaintiffs are not entitled to this drastic remedy.

DEFENDANTS' MOTION TO VACATE THE INJUNCTION

There is ample authority for the proposition that an injunction order may be modified or dissolved in the discretion of the district court. However, such modification or dissolution requires a showing of changed circumstances so that continuance of the injunction is no longer justified and/or because it will work oppressively against the enjoined parties. *United States* v. *Swift & Co.*, 286 U. S. 106, 114-15 (1932); *Tanner Motor Livery, Ltd.* v. [1687] *Avis, Inc.*, 316 F. 2d 804, 810 (9th Cir.), cert. denied, 375 U. S. 821 (1963); *Tobin* v. *Alma Mills*, 192 F. 2d 133, 136 (4th Cir. 1951), cert. denied, 343 U. S. 933 (1952); *Grand Union Equip. Co.* v. *Lippner*, 167 F. 2d 958, 960 (2d Cir. 1948); *California Packing Corp.* v. *Sun Maid Raisin Growers*, 165 F. Supp. 245, 252 (S. D. Cal. 1958), aff'd, 273 F. 2d 282 (9th Cir. 1959); *Mitchell* v. *Helena Wholesale, Inc.*, 163 F. Supp. 101, 103 (E. D. Ark. 1958); see *S. C. Johnson & Son, Inc.* v. *Johnson*, 175 F. 2d 176, 177 (2d Cir.), cert. denied, 338 U. S. 860 (1949). In the absence of such a showing, the injunction will not be disturbed.

Accordingly, the sole issue I am faced with herein is whether there have been such new circumstances shown that would warrant dissolution of the injunction. Defend-

ants' contention that plaintiffs' cause of action is not within Section 43(a) of the Lanham Act, 15 U. S. C. § 1125(a), is not properly raised at this time since defendants have had their day in court on this issue (at least at this time), and neither appealed this Court's injunctive order nor sought timely reargument. Therefore any consideration of this issue does not fall within the [1688] aforementioned criteria for modifying or dissolving the injunction.[6] Moreover, the remainder of defendants' arguments, rather than showing a change in conditions from the time the injunction was granted, merely rehashes, in far greater detail to be sure, most of the arguments previously presented to the Court and as such would appear to be improperly raised herein. However, even considering the offer of proof as properly before this Court, I am more fully convinced than before that there was no impropriety in the granting of the injunction.

Defendants' version of the facts is set forth as follows: In 1965, Rayex decided to introduce a line of ski-sunglasses to be called "Astro-Ski." Raymond Tunkel, Rayex president, saw AO's C'Bon Camelet and thought it would make an attractive ski-sunglass if the Polaroid glass were removed therefrom and photochromic lenses[7] substituted. Defendants allege that Tunkel gave Oram Morin, manager of Rayex' Plainville, Connecticut, plant, a pair of Camelot glasses and asked him to make a hand-copy thereof, which was to be used as a prototype for a Rayex model. Mr. Tunkel allegedly received the handmade prototype from Morin and took it with him to [1689] Europe where it was intended that a mold would be made. While in Europe, Tunkel decided to have the glasses manufactured there thus eliminating the need for a mold, Tunkel purportedly took the prototype back with him from Europe and turned it over to Gordon Hallerman for the purpose of having it included in the Astro-Ski catalog. Hallerman claims to have taken the prototype to one Harvey Dresner, a pro-

fessional photographer who prepared photographs for the catalog. The handmade prototype allegedly disappeared at a subsequent sales meeting.

Plaintiffs contended that the deposition testimony of Tunkel, Hallerman and Dresner[8] is a fabrication and the record strongly indicates that plaintiffs' assertion is correct, as will be fully set forth *infra*. Defendants contend that plaintiffs' claim of a fabricated story is tantamount to a charge of fraud which must be proved by clear and convincing evidence. Defendants' argument is purely sophistic. An attack on the credibility of witnesses does not change the underlying action into a fraud action, nor shift the burden of proof. Nevertheless, even assuming defendants' argument to be worthy of merit, I conclude that plaintiffs have [1690] sustained the heavier burden which defendants seek to place on them.

At the outset, defendants rely heavily on the production by Morin, at his deposition, of a heavy wooden block, a steel template and two metal front-pieces which, defendants claim, fully corroborate the deposition testimony. Morin claims to have shaped the block to show the compound angles in the original front-piece and to insure his ability to reproduce those angles. The steel template was to be used as a pattern in making the front-piece for the prototype. Morin claims that the metal front-pieces were made at the same time as the front-piece for the handmade model and were duplicates thereof.

But would not a defendant who is accused of committing the acts alleged herein, to refute those accusations, attempt to locate some credible evidence that a prototype in fact existed and was used in the preparation of the catalog? Of course, the best evidence of this would be the prototype itself. Failing to locate this, defendant would be expected to produce the wooden [1691] block, the steel template and the duplicate front-pieces as evidence of the prior existence of the prototype. But where were these items in

June or July of 1966 when the motion was argued or when reargument could have been sought? Why was the Tunkel affidavit unsupported in June of 1966 if evidence of the existence of a prototype existed? I cannot accept the presence of these items at this time as any corroborative evidence whatsoever of the deposition testimony.

The major argument presented herein by defendants is that, on the prior motion, plaintiffs failed to inform the Court of the existence of a physical difference between the alleged Morin prototype and the C'Bon Camelot. Defendants claim that Morin, in shaping the outer end of the temple of the alleged handmade model, made a mark close to the ear end of the temple with his pliers, resulting in an abrupt angular change of the plane of the outer surface of the temple at that point and which appeared in the photograph as a sort of obelisk with a wide base, blunted tip and tapered sides, and in the bottom line of that surface as an angular change of line.

[1692] This contention is thoroughly refuted by plaintiffs. Firstly, Gino L. Agraz, an independent photographer employed by plaintiffs, at plaintiffs' request almost exactly reproduced this so-called plier mark in a pair of Camelot glasses by photographing said glasses on a dark background paper. It is his opinion that this mark was nothing more than a photographic highlight. While defendants dismiss the Agraz work as mere trick photography, I have examined his affidavit and the transcript of his testimony on this motion and find that he has candidly set forth the work he performed and his testimony is highly credible. Additionally, Mr. Dresner, defendants' photographer, admitted the authenticity of the Agraz work.

Secondly, at his deposition Mr. Morin was asked to combine one of the metal front-pieces he allegedly made with the frame of a stock model of the C'Bon Camelot. When he had done so, a photograph of the result of his work was taken by Dresner. This photograph almost exactly shows

the same angular change of line of the right temple which defendants characterize as [1693] peculiar to the 1011 Alpine catalog photograph. Both sides agree that the Dresner photograph is of the Camelot frame with the handmade front-piece. Thus, both differences alleged to exist are shown to be mere results of varied photographic conditions.

Thirdly, the Morin deposition indicates that both temples were flared out and had plier marks. Although the alleged Alpine photograph depicts the exterior portion of the right temple extremity and the interior portion of the left one, assuming the defendants are correct in their contention that a plier mark had been made, such plier mark is conspicuous by its absence from the left interior portion of the temple of the catalog picture. Defendants argue that the marking that would appear on the rear face would be entirely different than that appearing on a front face since the surface on the rear face is stretched out rather than bent in. Whether the marking on the inner surface would be the same or different is immaterial—some marking should appear either from the plier mark itself or from a highlight thereof if defendants are to be believed. Accordingly, for the foregoing reasons, I find defendants' [1694] plier mark argument without merit.

Certain other discrepancies in defendants' evidence appear which make the existence of a prototype unlikely. Hallerman testified that he took the prototype to Dresner to be photographed and that he knew that it was a handmade sample, *inter alia,* because "the finish of the front . . . of the hand-made sample . . . was a dull finish and did not look to me like a finished glass." Hallerman Deposition of November 8-9, 1966, at 306. He reiterated, "the hand-made sample which was given to me by Mr. Tunkel was dull and looked to me to be unfinished. It did not appear to be a sample which had been or could be purchased in a store as a first quality piece of merchandise." *Id.* at 307. On cross-examination, plaintiffs' counsel elicited from

Hallerman the response that the metal front-pieces of the handmade prototype resembled the duplicate metal front-pieces allegedly made by Morin *Id.* at 462-63. Defendants argue that it is probable the aluminum front-piece used in making the prototype was more highly polished than its duplicates, but that in any event the difference is only slight and can be readily [1695] accounted for by the handling it has received. The Hallerman testimony refutes defendants' first argument and, as for the alternate contention, I have examined the metal front-pieces of the so-called duplicates and they are dull, pitted and scarred. It is highly unlikely that a front-piece such as either of the duplicates could have possibly been used to obtain the highly-polished result that appears as the 1011 Alpine in the Astro-Ski catalog. Contrary to defendants' position, the difference is most pronounced, and graphic evidence of this has been presented to the Court in the Dresner photograph of the Camelot frame with the handmade front-piece which clearly indicates the inferior result that would have been obtained by using the handmade front-piece in the catalog picture.

It has also been shown by defendants' witnesses that on other occasions where Rayex had copied sunglasses no handmade prototype had been prepared. Rather, the sunglass to be copied had been used to prepare the mold. *Id.* at 460-61. It would appear highly unlikely for Rayex to have asked a busy executive such as Mr. Morin [1696] to spend one full week in the preparation of the prototype when all Tunkel had to do was take a pair of the Camelot glasses to Europe with him and have them used in preparation of the mold. The only possible purpose for the construction of the prototype would be for the catalog photograph, and no such purpose appears from the deposition testimony. Defendants' argument that AO prepared prototypes is irrelevant since AO is an innovator and must of necessity prepare something from which a mold can be made.

Additionally and most significantly, when Tunkel returned from Europe he corresponded with his French manufacturer and referred to the sunglasses he had taken with him as "the wrap-around type metal front polaroid glass." In the French manufacturer's reply of May 26, 1965, the sunglasses are referred to in the same manner, and in a letter of July 2, 1965 to Tunkel are again referred to as the "Polaroid sunglass." In Tunkel's reply of July 6, 1965, the glasses are described in the same way. It was developed in the Tunkel deposition that he was aware that "Polaroid" is a trademark of the Polaroid Company, that AO was the exclusive [1697] licensee of Polaroid polarizing material for a number of years, that Rayex had not sold Polaroid lens sunglasses for some ten years, that in 1964-1965 Rayex sold no polarizing lenses,[9] and that the C'Bon Camelot was sold with Polaroid lenses. It would appear from the foregoing that what Tunkel took with him to Europe was the Camelot rather than the Alpine prototype as he claimed. Defendants' only refutation of this argument is that it is pure speculation. Rather than being explained away, the above-mentioned conclusion is inescapable and renders Tunkel's testimony even more incredible.

All the factors hereinbefore set forth plus the great differences between the alleged Alpine photograph and the marketed product, and the absence of any sketches, notes, photographs or other identifying memoranda of Morin's work in preparation of a prototype lead to the conclusion that the July 1, 1966 injunction was properly granted. Any deficiencies alleged to have been present at that time (if these can even be considered to have affected the determination) have been readily cleared up by the extensive record herein which [1698] demonstrates, at least for the purpose of granting a preliminary injunction, that the photograph of the 1011 Alpine actually was that of the C'Bon Camelot.[10] This conclusion can be reached without

even considering the photographic evidence submitted by plaintiffs which shows almost perfect registry between the 1011 Alpine picture and the picture of a stock pair of C'Pon Camelot glasses. Any slight failure of registry is readily explained by the difference in temples in any two pairs of glasses, changes caused by buffing, polishing, wear in stamping tools, and numerous other variables.

Conclusions

Plaintiffs' motion to punish for contempt is granted to the extent indicated herein. If the parties cannot agree as to the appropriate monies to be recovered, affidavits should be submitted to the Court on this issue no later than May 15, 1967. Defendants' cross-motion to vacate the injunction is in all respects denied.

The findings of fact and conclusions of law [1699] as required by Rule 52(a) are contained herein.

Settle order on one (1) day's notice in conformity herewith.

Dated: New York, New York
April 26, 1967.

/s/ Charles H. Tenney
U. S. D. J.

[1700]

FOOTNOTES

[1] Pg. 5a. In the prior Opinion of the Court, dated June 28, 1966, it was determined that a sufficient relationship existed between the products of plaintiffs and defendants so that they are in competition.

[2] Pg. 9a. Other discrepancies in the Tunkel deposition will be pointed out *infra.*

[3] Pg. 11a. Paragraph 2A of the injunction order provided:

> 2. ORDERED that the defendants:
>
> A. Withdraw their ASTRO-SKI catalogue (Plaintiffs' Exhibit 2 annexed to the Complaint) by mailing to all persons, firms, organizations and companies known or believed to possess a copy of same, a letter in the form annexed as Exhibit A to this Order, said letter to be mailed by defendants within ten (10) days of the date of this Order. Defendants shall maintain accurate records of the addresses of such letters and the respective dates of mailing.

[4] Pg. 12a. Tunkel also stated:

> "I believe that on a Friday, *which was July 1st, when we first received this injunction order,* order of preliminary injunction, I sat down with Gordon Hallerman and also had a discussion with Mike Friedman and we tried to ascertain amongst ourselves who would possibly possess a catalog that we would know of, and between the three of us we came up with the names of the eleven people to whom the letters were sent." Tunkel Affidavit of November 14-15, 1966, at 834. (Emphasis added.)

[1701] An affidavit submitted on behalf of plaintiffs by one Nathan H. Lotter, legal and docket clerk for plaintiffs' counsel, indicates that the order was not signed until the close of the Court's business day on July 1, 1966. However, defendants' counsel was notified by my chambers of the signing of said order on that same day. That this conversation described by Tunkel in fact took place must be considered in the light of his statements on oral deposition that he was not in New York for most of the period from July 1 through July 17, 1966. No notice of the signing of the order appeared in the New York Law Journal until July 6, 1966. However, no weight need be given to this possible inconsistency in reaching the conclusions herein.

FOOTNOTES (Continued)

[5] Pg. 13a. Other arguments have been presented as well and have been alluded to and dismissed in the discussion *supra.*

[6] Pg. 17a. Defendants' argument on the law is that plaintiffs in order to bring themselves within the Lanham Act must show "a false designation of origin." See, *e.g., Societe Comptoir De L'Industrie Cotonniere Etablissements Boussac* v. *Alexander's Dep't Stores, Inc.*, 299 F. 2d 33 (2d Cir. 1962); *Joshua Meier Co.* v. *Albany Novelty Mfg. Co.*, 236 F. 2d 144 (2d Cir. 1956). However, to sustain a cause of action under § 43(a) of the Act, a plaintiff must allege *either* "a false designation of origin, *or* any false description or representation." (Emphasis added.) See *Societe Comptoir De L'Industrie Cotonniere Etablissements Boussac* v. *Alexander's Dep't Stores, Inc., supra* at 36. Plaintiffs appear to have clearly brought themselves within the second alternative.

[7] Pg. 17a. The photochromic lens, a product of the American Cynamid Corp., was designed to respond to the degree of light prevailing so that in bright sunlight it turns a deep gray, cutting down the light transmitted, [1702] whereas in dim areas the lens retains its basic amber color, thus allowing a larger amount of light transmission.

[8] Pg. 18a. No discussion is necessary of the deposition of one Saul Lustig, foreman of Gordonian Lithographers, Inc., producer of the condemned catalog, since Lustig never claims to have seen the alleged prototype.

[9] Pg. 22a. The photochromic lenses used in the 1011 Alpine cannot be characterized as polarizing type lenses.

[10] Pg. 22a. Additionally, defendants' contention that AO failed to inform the Court of the difference in lenses between Alpine and Camelot is rejected. See n. 1 to *American Optical Co.* v. *Rayex Corp.*, F.Supp. , 66 Civ. 1633, S. D. N. Y., June 28, 1966.

Opinion on Appeal from Order of May 23, 1967 of the District Court for the Southern District of New York

(Argued April 24, 1968 Decided April 26, 1968)

[Reported only in 157 USPQ 465]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(HAYES, ANDERSON AND FEINBERG, Circuit Judges)

PER CURIAM:

Appellants appeal an order of the United States District Court for the Southern District of New York, Charles H. Tenney, *J.*, entered May 23, 1967, which granted plaintiffs' motion for contempt for failure to comply with a preliminary injunction, and denied appellants' cross-motion to vacate that injunction. The preliminary injunction in this action for unfair competition was granted by Judge Tenney on July 1, 1966, pursuant to his opinion reported at 266 F. Supp. 342 (S. D. N. Y. 1966). Appellants took no appeal from that order. Instead of seeking to obtain "a trial of the action on the merits," see Rule 65, Fed. R. Civ. P., appellants attempted four and one-half months later to have the preliminary injunction vacated despite their earlier failure to appeal. Appellants conceded at oral argument before us that their cross-motion to vacate the preliminary injunction was not based on changes in circumstances which occurred after the injunction was entered. It is clear that by their cross-motion appellants were merely trying to relitigate on a fuller record preliminary injunction issues already decided by Judge Tenney. We affirm the judge's refusal to vacate the injunction. As to the contempt, there was ample support for the judge's finding that appellants' "conduct has been in blatant disregard of the . . . preliminary injunction." We will not further consider at this stage of the proceeding the validity of the underlying preliminary injunction from which appellants took no appeal.

Judgment affirmed.

[1718] Order Appealed From

[Entered May 23, 1967]

This matter came on for hearing on the motion of plaintiffs for an order punishing defendants for a contempt of the preliminary injunction order of this Court of July 1, 1966, and for enlargement of said order, and on defendants' cross motion to vacate said order, and the Court having considered the record, including the testimony taken by deposition and that before the Court on January 18, 1967, and all exhibits submitted by the parties, and the memoranda of the parties in support of and in opposition to said motions, and having heard oral argument thereon, and being fully advised, the findings of fact and conclusions of law required by Rule 52(a), F. R. C. P. and Civil Rule 14(c)(1) of this Court being contained in Opinion No. 33448 of this Court, filed April 26, 1967.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said motion for contempt by plaintiffs be granted, said motion for enlargement by plaintiffs be denied, and said cross-motion be denied.

[1719] It is further ORDERED that plaintiffs be compensated in the amount of Twenty Thousand Dollars ($20,000.00), said sum having been agreed by counsel for the parties as the reasonable expenses incurred by plaintiffs in presenting the contempt issue to the Court, including the expenses incident to defendants' cross-motion. Such amount shall be payable to plaintiff American Optical Company within 14 days from the date of entry of this

order, unless a bond in the amount of $23,000.00 be filed and approved by the Court prior to the expiration of said 14 day period.

Dated: New York, New York
May 22, 1967

/s/ CHARLES H. TENNEY
United States District Judge

Approved as to form:

/s/ MORTON AMSTER
Attorney for Plaintiff[s]

/s/ JOHN VAUGHAN GRONER
Attorney for Defendant[s]

SUPREME COURT, U. S.

FILED

AUG 7 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968, NO. 208

AMERICAN OPTICAL COMPANY, C'BON, INC AND COOL-RAY, INC.,

Respondents,

v.

RAYEX CORPORATION AND MONACO OPTICAL CORPORATION,

Petitioners.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1968, No. 208

AMERICAN OPTICAL COMPANY, C'BON, INC. AND COOL-RAY INC.,

Respondents,

v.

RAYEX CORPORATION AND MONACO OPTICAL CORPORATION,

Petitioners.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Justices of the Supreme Court of the United States:

Respondents pray that petitioners' request for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on April 26, 1968 (rehearing denied May 20, 1968), be denied.

Questions Presented

1. Are there any grounds for review where a party has failed to take an appeal from a preliminary injunction and subsequently presents evidence which is considered by the district court as well as the court of appeals and results in complete affirmance of the original decree?

2. Can a court, which is asked to review an earlier decree from which no appeal was taken, consider, in refusing to disturb the earlier and unappealed decree, the fact that subsequently presented evidence was in existence and available at the time of the original proceeding?

3. Does Section 43(a) of the Lanham Act create a new right of action separate and distinct from conventional trademark causes of action and one which does not require the traditional earmarks of trademark causes of action?

4. Is a party in contempt of a preliminary injunction order when it fails to live up to both the spirit and the letter of the order.

Statement of the Case

Petitioners* seek a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit. That decision affirmed an order of the United States District Court for the Southern District of New York dated May 23, 1967 which covered two separate matters:

A. granted respondents' motion to punish for contempt; and

B. denied petitioners' cross-motion to vacate the preliminary injunction entered herein on July 1, 1966.

This action was commenced on June 8, 1966 and charged petitioners with improper use of photographs of respond-

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* American Optical Company, C'Bon, Inc. and Cool-Ray, Inc. will be referred to herein as "respondents"; Rayex Corporation and Monaco Optical Corporation will be referred to as "petitioners." In addition thereto, references to Petitioners' Brief will be to "Pet. Br." followed by the page number. The Record will be cited as "R." followed by the page number.

ents' sunglasses in its Astro-Ski catalog to advertise and promote the sale of petitioners' lower-priced and inferior products. Specifically, respondents contended that petitioners had caused a photograph of respondents' Camelot sunglasses to be inserted in petitioners' Astro-Ski catalog under the designation "#1011 Alpine," and had improperly used the catalog photograph to sell petitioners' sunglasses. Moreover, the complaint specified that the Alpine sunglasses were in fact different in appearance from the Camelot sunglasses, with the Alpine also being inferior in construction and sold at a lower price. Preliminary and final injunctive relief and an accounting were sought under Section 43(a) of the Lanham Act of 1946 (15 U.S.C. § 1125(a)).

The complaint was accompanied by an order to show cause for a preliminary injunction supported by detailed affidavits reciting the basis for the injunctive relief sought (R. 1-40).* In opposition, petitioners submitted the single affidavit of their president, Raymond Tunkel (R. 55-61). On June 14, 1966, the return date specified in the order to show cause, oral argument was heard before the Honorable Charles H. Tenney. The district court granted respondents' motion in its opinion of June 28, 1966 (R. 63-69) and entered its preliminary injunction order on July 1, 1966 (R. 73-77). No appeal was taken from that order, nor was any reargument sought.

In the preliminary injunction order (R. 73-75), petitioners were enjoined from using photographs of respondents' Camelot sunglasses to sell petitioners' Alpine sun-

---

* Petitioners decry (Pet. Br. 4) their alleged lack of preparedness for the oral hearing on June 14, 1966 on respondents' application for a preliminary injunction. Nevertheless, no request was made of the Court for any extension.

glasses, from circulating any catalog which included such photographs and from selling sunglasses previously designated as #1011 Alpine ordered from the complained of Astro-Ski catalog.

In addition, and at least as important, petitioners were ordered to take certain affirmative steps to assure that no sales would be made as a result of petitioners' prior wrongful activity to the further irreparable harm of respondents. Among the affirmative acts which petitioners were to perform in compliance with the order of July 1, 1966 was to withdraw the complained of Astro-Ski catalog:

> ... *by mailing to all persons,* firms, organizations and companies *known or believed to possess a copy of same, a letter* in the form annexed as Exhibit A to this Order, said letter to be mailed by defendants within ten (10) days of the date of this Order. Defendants shall maintain accurate records of the addressees of such letters and the respective dates of mailing. (R. 74, para. 2.A, emphasis added.)

Although thousands of petitioners' catalogs were printed and mailed (R. 58; 1148-53), petitioners only sent out eleven of the Exhibit A letters (R. 1670; 468-72; 489-90).

On the basis of this amazing revelation, and as respondents' counsel indicated on the record on August 16, 1966 (R. 496-97) during the deposition of Mr. Tunkel, respondents intended to move to punish petitioners for their blatant contempt. However, in order to afford petitioners' newly appointed counsel every opportunity to explore, in any manner they saw fit, all the facts in this case and to make whatever "complete development" (Pet. Br. 3) they felt was necessary, respondents voluntarily deferred bringing

on their motion so that "the Rayex story" could be developed. There followed extensive depositions taken by petitioners of four of their own witnesses, as well as of two of respondents' witnesses. Accordingly, petitioners were able to develop their own "story" following their own "script." "Full exercise of the right of cross-examination" (Pet. Br. 5) demonstrated numerous inconsistencies and apparent fabrications by petitioners' own witnesses.

Respondents' motion to punish for contempt and petitioners' cross-motion to vacate the order for preliminary injunction were considered by Judge Tenney, who also heard testimony and extensive argument at hearings held on January 18 and 24, 1967 (R. 1746-1922). The court also had the opportunity to observe the cross-examination by petitioners of Gino L. Agraz, an expert photographic witness whose affidavits were relied on by respondents, both during the initial preliminary injunction proceeding and on petitioners' motion to vacate that injunction. The court later characterized Mr. Agraz's testimony as "highly credible" (R. 1692).

Thereafter, the court granted respondents' motion and denied petitioners' motion in a further opinion handed down on April 26, 1967 (R. 1667-1702). Petitioners appealed from the order entered on Judge Tenney's opinion on May 23, 1967 (R. 1718-19). The Court of Appeals for the Second Circuit affirmed on April 26, 1968 and denied a petition for rehearing on May 20, 1968. The petition to this Court was docketed on June 18, 1968.

Reasons for Denying the Writ

1. Petitioners' first purported reason for granting the writ is based upon an alleged "conflict" which in reality is non-existent. There is no conflict between this case and this Court's decision in *United States* v. *United States Smelting, R. & M. Co.*, 339 U.S. 186 (1950), nor is there any conflict with the Ninth Circuit's decision in *Tanner Motor Livery, Ltd.* v. *Avis, Inc.*, 316 F.2d 804 (9th Cir.), *cert. denied*, 374 U.S. 821 (1963). The court of appeals in this case never held that petitioners "must appeal or go to trial on the merits." (Pet. Br. 6)

2. Petitioners were not foreclosed, either in the district court or in the court of appeals, from presenting evidence relating to "changed circumstances" involving matters which were in existence at the time of the original preliminary injunction proceeding. Both lower courts were entitled to and undoubtedly did take this factor into consideration in reaching their respective decisions. The conflicts alleged to exist by petitioners have no basis in fact, and all of petitioners' cases cited to this effect are therefore irrelevant.

3. The interpretation of Section 43(a) of the Lanham Act of 1946 made by the district court and affirmed by the court of appeals was squarely within the Act and is consistent with the intent of Congress in passing that Act whereby a new and different cause of action was created. There is no conflict between this interpretation and that placed on Section 43(a) by any of the other principal courts which have considered that section. *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F.2d 538 (2d Cir. 1956)

(concurring opinion at 546); *L'Aiglon Apparel, Inc.* v. *Lana Lobell, Inc.*, 241 F.2d 649 (3d Cir. 1954); *Parkway Baking Co.* v. *Freihofer Baking Co.*, 255 F.2d 641 (3d Cir. 1958); *Federal-Mogul-Bower Bearings, Inc.* v. *Azoff*, 313 F.2d 405 (6th Cir. 1963); *Smith-Victor Corp* v. *Sylvania Electric Products, Inc.*, 242 F. Supp. 302 (N.D. Ill. 1965); *Gold Seal Co.* v. *Weeks*, 129 F. Supp. 928 (D.D.C. 1955), *aff'd sub nom. S. C. Johnson & Son* v. *Gold Seal Co.*, 230 F.2d 832 (D.C. Cir.), *cert. denied*, 352 U.S. 829 (1956). Once again, the conflicts alleged by petitioner (Pet. Br. 7) are nonexistent; those "conflicting" cases are either distinguishable from or in actual harmony with the leading *L'Aiglon* case, *supra*.

4. Petitioners were found to have been in contempt of the district court's injunction order for having failed to perform specifically stated affirmative acts, and also for having committed obvious breaches of the "spirit" of that order. This holding, which was affirmed by the court of appeals, is not affected by this Court's ruling in *Int'l Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 19 L. Ed. 2d 236 (1967) and is quite clearly in complete harmony with that case, with *Terminal R.R. Ass'n* v. *United States*, 266 U.S. 17 (1924) and with Rule 65(d) of the Federal Rules of Civil Procedure.

5. By any measure, this case is not appropriate for review by writ of certiorari.

Argument

1. Petitioners Were Not Denied Appellate Review by the Court of Appeals.

Petitioners' initial attack is directed against the court of appeals' language, which was critical of petitioners' failure to seek "a trial of the action on the merits" as that language is used in Rule 65 of the Federal Rules of Civil Procedure (R. 1940; Pet. Br. 7-8). However, when the decision is read in context, it is clear that the court of appeals was merely suggesting one illustrative reason why petitioners' case, even at that level, was defective. It is only petitioners who are suggesting that the court of appeals was in error in citing Rule 65 relating to advancing a trial for consolidation with an injunction hearing—the court of appeals made no such suggestion or ruling. Rather, the court was indicating that had petitioners taken advantage of the many available trial procedures, rather than proceeding in the circuitous way they elected, petitioners might have been able to properly pursue an appeal from an ultimately delivered final judgment.

Petitioners seem to be proceeding on the erroneous theory that they are being penalized for having taken an appeal from an interlocutory order, when such appeal is specifically authorized by statute. Thus, petitioners refer to the action of the court of appeals as "making an earlier decision an iron curtain which, whether right or wrong, could not be penetrated." (Pet. Br. 11) Since the decree on which petitioners took their appeal was interlocutory, such appeal was permissive and not mandatory. *Victor Talking Machine Co.* v. *George*, 105 F.2d 697 (3rd Cir.), *cert. denied*, 308 U. S. 611 (1939).

There has never been any contention in this case, as petitioners seem to think (Pet. Br. 8), that the decision on the preliminary injunction, coupled with petitioners' failure to appeal therefrom, represented "the law of the case." Indeed, respondents have never made that contention because it has been clear from the outset that the first decision by the district court was *not* "the law of the case." 6 *Moore's Federal Practice,* ¶58.08-09 (1966 ed.).*

In fact, respondents fully agree with petitioners' citation of *Simmons Co.* v. *Grier Bros. Co.,* 258 U.S. 82 (1922) as standing for the proposition that even if no appeal is taken from an interlocutory decree, the trial court can still revise the decree at any time if necessary. This is so basic a principle of equity jurisdiction that respondents find it difficult to believe that this forms the major piliar of petioners' appeal to this Court.**

Respondents also endorse *United States* v. *United States Smelting, R. & M. Co., supra,* discussed and relied upon by petitioners at pages 8-10 of their Petition. Although the decree appealed from herein was interlocutory, it is clearly an appealable order under 28 U.S.C. § 1292(a)(1). Since respondents do not contend that the first decision of the district court is "the law of the case," no further discussion of *United States Smelting, R. & M. Co.* is believed to be necessary.

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* However, by pursuing the present appeal, petitioners have apparently foreclosed further consideration by the district court of the merits of the case as decided to date. *In re Sanford Fork & Tool Co.,* 160 U.S. 247 (1895); *Smith* v. *Vulcan Iron Works,* 165 U.S. 518 (1897).

** That the district court recognized its power to revise its earlier decree is clear from its statement that "There is ample authority for the proposition that an injunction order may be modified or dissolved in the discretion of the district court." (R. 1686)

Numerous additional cases, including the ones cited by petitioners, reflect the appropriate maintenance of continuous jurisdiction by an equity court over its previously granted decree. This principle is even clear in the case of *United States* v. *Swift & Co.*, 285 U.S. 106 (1932) which petitioners attack so vehemently (Pet. Br. 11). It is also clear from cases such as *Grand Union Equip. Co.* v. *Lippner*, 167 F.2d 958 (2d Cir. 1948); *S. C. Johnson & Son* v. *Johnson*, 175 F.2d 176 (2d Cir.), *cert. denied*, 338 U.S. 860 (1949); and *Tobin* v. *Alma Mills*, 192 F.2d 133 (4th Cir. 1951), *cert. denied*, 343 U.S. 933 (1952).

As to *Tanner Motor Livery, Ltd.* v. *Avis, Inc., supra*, respondents are in full agreement with that decision even though it is heavily relied on by petitioners (Pet. Br. 9). Petitioners quote from *Tanner* to the effect that the district court can reconsider a preliminary injunction order. But there is no dispute on this point. However, the Ninth Circuit did not stop with the sentence quoted by petitioners at page 9 of their Petition. Indeed, the subsequent language of the Ninth Circuit is most revealing (at p. 810):

> . . . We think that in the absence of changed circumstances, and except there be [sic] some other "most cogent reason," when a judge makes or denies an interlocutory order, and when an appeal lies, as of right, from such an order, *it should not be reconsidered, even by the judge who first made the order*, much less by another judge. Orders of United States Courts, deliberately made, after proper notice and hearing, and subject to review by this Court, are not to be lightly changed by any judge of the trial court. (Emphasis added.)

Thus, while the district court here had the *power* to revise its earlier decree, it found nothing in the record to war-

rant such revision. Certainly the expanded record which petitioners presented to the district court was not a basis for revising the decree, since it led the district court to conclude that "I am more fully convinced than before that there was no impropriety in the granting of the injunction." (R. 1688) That the district court, and later the court of appeals, might have applied a rigorous standard in reviewing petitioners' request for revision of the decree is, however, not a ground for relief to be afforded by this Court, or for that matter by any court.

In the present case, the courts below simply noted that from the point of view of expeditious judicial administration, it would have been more desirable had petitioners proceeded with the remainder of the procedures available to them in the trial court. Petitioners would have thus been able to raise the entire spectrum of their case and, if dissatisfied with the result, could appeal from the final judgment. *Western States Mach. Co.* v. *S. S. Hepworth Co.*, 152 F.2d 79 (2d Cir. 1945); *McLain Lines* v. *The Ann Marie Tracy*, 176 F.2d 709 (2d Cir. 1949); *DePinto* v. *Provident Security Life Ins. Co.*, 374 F.2d 50 (9th Cir. 1967).

Petitioners have never been denied (a) the right to appeal; or (b) the right to seek reargument; or (c) the right to obtain appellate review or revision of any of the district court holdings or orders. However, no substantial reviewable issue is presented to this Court simply because petitioners have been unable to convince the tribunals below and now lament the failure of their calculated course to try and retry the initial granting of a preliminary injunction in this case.

2. No Limitation Was Placed on Petitioners' Right to Submit Additional Evidence to the Lower Courts.

Petitioners make much of the fact that they were allegedly deprived of the opportunity to bring before the court of appeals their "fuller record" as developed over the course of several months (R. 1684; Pet. Br. 5). Initially there can be no question that the district court considered all of the proofs which petitioners mustered in their futile cross-motion to vacate the original preliminary injunction. Thus, the district court stated that:

> . . . As will be developed *infra,* the presentation of this complete record more fully convinces me that the preliminary injunction was not improvidently granted. . . . (R. 1684)

and that

> . . . I am more fully convinced than before that there was no impropriety in the granting of the injunction. (R. 1688)

The "attack" (Pet. Br. 4) of which petitioners accuse the court of appeals simply represents the reaction of an appellate court to "tactics which appear to have been designed to divert the Court's attention from the contempt issue" (R. 1684), and to petitioners' attempt "to relitigate on a fuller record preliminary injunction issues already decided by Judge Tenney." (R. 1940) The district court considered all of petitioners' newly submitted evidence—the district court did not preclude the making of a fuller record, but found nothing to suggest that it should change its previous decision. The court of appeals obviously recognized the discretionary nature of the district court's denial of petitioners' cross-motion when they stated, "We

affirm the judge's refusal to vacate the injunction." (R. 1940) Petitioners' statements (Pet. Br. 4-6) to the effect that they were somehow arbitrarily and capriciously limited in their presentations simply have no foundation in fact.

The *Marconi* case on which petitioners rely (Pet. Br. 10) is not pertinent because petitioners were not in fact denied the opportunity which this Court held was available to the appellants in *Marconi*. Simply stated, the district court here permitted petitioners to obtain "reconsideration" of the preliminary injunction following the presentation of "the Rayex story." The district court then denied petitioners' cross-motion to vacate the preliminary injunction and the Second Circuit affirmed. This affirmance belies petitioners' casual and inaccurate statement at page 4 of their Petition that the basic facts of the case were "not reached by the Court of Appeals."

Petitioners make a contorted attempt to distinguish the present case from *United States* v. *Swift & Co., supra.* That the *Swift* case is relevant to the present proceeding in terms of establishing a rigorous standard for those who would seek to have an injunctive decree modified subsequently is revealed by the recent interpretation of that case in *United States* v. *United Shoe Mach. Corp.,* U.S. , 20 L. Ed. 2d 562 (1968). In *United Shoe,* this Court demanded of one seeking such relief "an appropriate showing," noting that in *Swift,* as here, "the defendants sought relief not to achieve the purposes of the provisions of the decree, but to escape their impact." (20 L. Ed. 2d at 566)*

* Petitioners are now, for the first time, showing some serious concern over their burden of establishing some different (if not

Interestingly enough, this Court ultimately permitted the Government in *United Shoe* to present facts showing that even more stringent provisions in the decree were required. Respondents herein do not go so far. They merely would have the original decree continued in full force and effect as has been done by both lower courts in this case.

Petitioners also misconstrue the nature of the proceedings below when they suggest (Pet. Br. 10-11) that the lower courts refused to consider the evidence presented by petitioners in their cross-motion to vacate the earlier preliminary injunction order. That the district court considered this evidence is clear from its second opinion (R. 1688-98). The court of appeals also considered this material (R. 1940), although it certainly treated it summarily, possibly because of petitioners' failure to obtain a final judgment which would have been fully reviewable on appeal.

Admittedly, petitioners' newly appointed counsel has been quite diligent in exhausting the appellate procedures available with respect to the interlocutory decree of May 23, 1967 (R. 1718). "The Rayex story" was developed at great expense to both parties and was then presented to the two lower courts, who considered the story and rejected it. The

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"changed") circumstances to warrant any revision of the original decree (Pet. Br. 4, 6, 10-11). Although the *Swift* case was cited in the second district court opinion (R. 1686), and although this point was extensively briefed by respondents in their answering brief before the court of appeals, petitioners chose to completely omit any reference to *Swift* on the "changed circumstances" standard in their reply brief before the court of appeals. After having been confronted by some rather searching inquiries by the Second Circuit panel at the oral hearing, petitioners' counsel attempted to recoup lost ground by forwarding a letter to the panel. In view of the fact that the letter was dated April 26, 1968, the same date as the court of appeals' opinion, it would appear that the letter properly was not considered.

present complaint of petitioners is not directed to what actually *did* happen (i.e., that "the Rayex story" was dismissed out of hand as incredible or otherwise lacking in merit), but to what *did not* happen (i.e., that the lower courts failed to even consider "the Rayex story").

While it would be difficult to deny that the court of appeals, upon reviewing the extensive record in this case, was concerned with petitioners' obviously dilatory and diversionary tactics, and that the court of appeals certainly considered the fact that "the Rayex story" could have been completely uncovered prior to the original injunction proceeding, or at least at a trial on the merits, that is a far cry from condemning the court of appeals for "making an earlier decision an iron curtain which, whether right or wrong, could not be penetrated." (Pet. Br. 11)

3. The Lower Courts' Interpretation of Section 43(a) Was Correct and in Harmony with Relevant Case Law.

Petitioners seem to be suggesting that Section 43(a) is, in effect, a redundant statutory provision, which merely duplicates existing trademark rights otherwise available to a party under different provisions of the Lanham Act. Contrary to petitioners' suggestions (Pet. Br. 12-14), there is no requirement in Section 43(a) for proof of passing off, confusion or secondary meaning. Section 43(a) was designed to give some assistance to those commercial innovators whose rights are violated by piratical competitors whose activities are wrongful in ways other than traditional trademark infringement. This is not to say, however, that the particular requirements of proof for establishing trademark infringement should be applied when enforcing Section 43(a).

Respondents agree that Section 43(a) "creates a new right of action" (Pet. Br. 11). And while respondents certainly do not object to a reading of Section 43(a) within the context of the Lanham Act, and a construction of that section which is consistent with the overall purpose of the Act (Pet. Br. 12), a clear misreading of the statute and the cases will not go unchallenged. To briefly review what Congress intended as to the proper scope of Section 43(a), it is clear that this section establishes a new right of action for damages and injunctive relief. *L'Aiglon Apparel, Inc.* v. *Lana Lobell, Inc., supra; Maternally Yours, Inc.* v. *Your Maternity Shop, Inc., supra; Scarves by Vera, Inc.* v. *United Merchants & Mfrs., Inc.*, 173 F. Supp. 625 (S.D.N.Y. 1959); *Zandelin* v. *Maxwell Bentley Mfg. Co.*, 197 F. Supp. 608 (S.D.N.Y. 1961); *National Dynamics Corp.* v. *John Surrey, Ltd.*, 238 F. Supp. 422 (S.D.N.Y. 1963). The *L'Aiglon* case heralded the beginning of a long line of cases which has sustained precisely the type of relief which respondents sought and obtained in the present case. In *L'Aiglon*, the Third Circuit, in determining that a cause of action under Section 43(a) was stated, expressed the view that this section of the Lanham Act was not "merely declarative of existing law," and that a broad new federal cause of action had been created thereby. They also analogized the cause of action to one for false advertising (at p. 651). The legal principle that Section 43(a) does not merely codify the common law, but rather creates a new statutory right, is by now unassailable. *Mutation Mink Breeders Ass'n* v. *Lou Nierenberg Corp.*, 23 F.R.D. 155 (S.D.N.Y. 1959); *Gold Seal Co.* v. *Weeks, supra; L'Aiglon Apparel Co., Inc.* v. *Lana Lobell, Inc., supra;* 68 Harv. L. Rev. 816, 881-82 (1955).

Only a "likelihood" of injury is required—there is no need to prove special damages. *Smith-Victor Corp.* v. *Sylvania Electric Products, Inc., supra.* There is no need to show a "secondary meaning," *Zandelin, supra.* There is no need to show intent to deceive or willfulness. *Parkway Baking Co.* v. *Freihofer Baking Co., supra.*

Petitioners also attempt (Pet. Br. 13-14) to create the impression that it is incumbent upon respondents to demonstrate such things as direct pecuniary loss and secondary significance to be entitled to relief. This is clearly unsupportable in view of the clear statutory language affording such relief to "any person who believes that he is or is likely to be damaged." Unquestionably, respondents have suffered actual pecuniary loss as a result of petitioners' offering to the very same trade (R. 541-42; 1223; 1249-50) of its inferior copy being sold at approximately one-half of the retail selling price of respondents' product. Regardless of this, however, petitioners' position simply is not well-founded in law. *Parkway Baking Co.* v. *Freihofer Baking Co., supra,* at 649.

Petitioner's reliance on *Canal Co.* v. *Clark,* 80 U.S. 311 (1871) (Pet. Br. 14), decided 75 years before the Lanham Act created the new statutory right under Section 43(a), is, to say the least, curious. And the issues presented to this Court involve none of the elements which were of concern in the *Sears* and *Compco* cases (Pet. Br. 14).

One of the most complete and cogent expressions of the philosophy behind Section 43(a) is found in *Gold Seal, supra,* where it was pointed out that for a violation of Section 43(a), one

> . . . need not show that any false description or representation was willful of intentional, need not prove actual diversion of trade (palming off, so to speak), need not establish a veritable monopoly position in the industry. It means that wrongful diversion of trade resulting from false description of one's products invades that interest which an honest competitor has in fair business dealings—an interest which the courts should and will protect whether it be called that of "property," "quasi-property" or something else. It represents, within this area, an affirmative code of business ethics, whose standards can be maintained by anyone who is or may be damaged by a violation of this segment of the code. In effect it says: You may not conduct your business in a way that unnecessarily or unfairly interferes with and injures that of another; you may not destroy the basis of genuine competition by destroying the buyer's opportunity to judge fairly between rival commodities . . . 129 F. Supp. at 940.

The cases relied on by petitioners as allegedly demonstrating a conflict among the circuits in the interpretation of Section 43(a) are all clearly distinguishable from the case at bar. Thus, *Samson Crane Co.* v. *Union Nat'l Sales, Inc.*, 87 F. Supp. 218 (D. Mass. 1949), *aff'd*, 180 F.2d 896 (1st Cir. 1950), simply involved a finding that false allegations that a store was being operated for defendant's benefit were not the kind of activity to which Section 43(a) was directed. Moreover, *Samson Crane* makes the perfectly proper suggestion that Section 43(a) should "include only such false descriptions or representations as are of substantially the same *economic* nature as those which involve infringement or other improper use of trade-marks." (87 F. Supp. at 222, emphasis added.) Also unrelated to the

present case is *Hesmer Foods, Inc.* v. *Campbell Soup Co.*, 346 F.2d 356 (7th Cir.), *cert. denied*, 382 U.S. 839 (1965). The *Hesmer* case involved an allegation that defendant falsely used the designation "Barbecue" on its bean can label. While the Seventh Circuit clearly recognized that injunctive relief was available on a showing of "likelihood of consumer deception" (346 F.2d at 359), it simply found no such likelihood under the facts in that case. To characterize the holding in *Hesmer* as "in direct conflict" with the decisions below in this case is ludicrous. Finally, in *Chamberlain* v. *Columbia Pictures Corp.*, 186 F.2d 923 (9th Cir. 1951), those claiming rights to the name "Mark Twain" sought to preclude distribution of a motion picture which allegedly created the impression of having been written by Samuel L. Clemens, whose pseudonym was Mark Twain. The Ninth Circuit in *Chamberlain* directed its attention primarily to the application of Section 43(a) regarding "acquiring a secondary meaning in connection with literary property." (at p. 923) The key distinguishing factor in that case, however, was that the court seems to have required establishing secondary meaning because "the goods are entirely non-competing and unrelated." *Ibid.* That the parties in the present case are competing with one another has never been contested; there is a specific finding to this effect by the district court (R. 63).

Section 43(a) constitutes a statutory code of business ethics and integrity; it is not merely a substitute or alternative to a cause of action for trademark infringement. It is not so broad, as petitioners would have us believe, to "blanket the entire field of trademark and unfair competition law" (Pet. Br. 14); but its scope is surely of sufficient breadth to proscribe petitioners' actions.

4. Petitioners' Contempt of the District Court's Order Is Apparent and the Holdings of Both Lower Courts to this Effect Are Proper in Fact and Law.

That the specific provisions of a court decree must be honored cannot be questioned. But even had petitioners made a "literal" compliance with the injunction, that would not be enough. More than a literal compliance with a decree is necessary—the decree must be honored in its spirit. *John B. Stetson Co.* v. *Stephen L. Stetson Co.,* 128 F.2d 981 (2d Cir. 1942); *Hollander* v. *Hollander,* 318 F.2d 818 (2d Cir.), *cert. denied,* 374 U.S. 831 (1963).

The district court's contempt ruling is supportable within the four corners of its opinion (R. 1670-85). That holding found that petitioners had essentially disregarded both the letter and the spirit of the court's order of July 1, 1966 (R. 73-77). The court of appeals affirmed, finding "ample support" for this holding (R. 1940).

Petitioners' arguments that they have been penalized for failing to do acts not required under the order are not sound. The district court's preliminary injunction order of July 1, 1966 was quite specific in all aspects, prohibitory as well as affirmative. Whether one seeks to characterize the order's letter, spirit or any other component, the tasks which petitioners were required to do were clear—their failure to have done them is equally clear.

No support for petitioners' position can be derived from *Int'l Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n,* 389 U.S. 64, 19 L. Ed. 2d 236 (1967). To rely on the *Longshoremen's* case, petitioners have initially ignored the specific terms of the order, derogated its "spirit" and then analogized this spirit to the "non-existent" language in the *Longshoremen's* case. This analogy

is thoroughly unpersuasive and, in fact, the *Longshoremen's* case is wholly inapplicable to the present situation. In the *Longshoremen's* case, the district court refused to elaborate on or explain the meaning of a very brief order. This Court condemned the order as too unclear to comply with Rule 65(d), Fed. R. Civ. P., in that it contained "only an abstract conclusion of law, not an operative command capable of 'enforcement.' " (19 L. Ed. 2d 244) The contempt finding was therefore reversed, this Court noting the lack of specificity in the decree and characterizing it as "unintelligible."

However, the order herein is detailed in both its affirmative and prohibitory aspects. A comparison of the present specific order (R. 73-77) with the skeleton order of the *Longshoremen's* case instantly reveals the inapplicability of that case.*

Petitioners may claim that they have literally complied with Paragraph 2.A. of the Order. This is not the case. But even if it were, petitioners have certainly not lived up to the spirit of the decree. Their inconsequential efforts to follow the mandate of the order achieved nothing more than a token compliance; it was an obvious and blatant attempt to evade the court order. They have properly been found in contempt.

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* Based on the Supreme Court's opinion, it would appear that the district court's failure in the *Longshoremen's* case to specify the meaning of its order, even when repeatedly requested to do so by counsel for the union, was a clear contributing factor in the decision to reverse the contempt finding—the union's counsel practically pleaded with the court for guidance in a colloquy which is reprinted in the opinion, but the court gave none. Petitioners here needed and sought no guidance. They submitted their own proposed counter-order and then received a detailed direction of what they were supposed to do and refrain from doing.

5. This Case Is Not Appropriate for Review by Writ of Certiorari.

A. *The Supreme Court Should Not Review a Case Where Its Sole Function Is to Give a Petitioner Merely a Further Channel of Appellate Review.*

As will appear from even the most cursory review of the record in this case, there is absolutely no reason, compelling or otherwise, for the Supreme Court of the United States to review the lower court decisions herein. Essentially, what has happened in this case to date is that petitioners have had three attempts to convince two different courts of the merits of their position in opposition to the granting of a preliminary injunction. They have failed on each such occasion. Successive attempts have been made over the past two years to have the district court and then the court of appeals review the specific findings of fact made in respondents' favor. The result of petitioners' having taken this tack in the preliminary phase of this litigation is that, at the appellate level, a contempt order against petitioners has been affirmed and petitioners' motion to vacate the original preliminary injunction has been denied.

In view of the importance of an adjudication in the United States Supreme Court and the impact of its decisions, this Court should not and does not act as a further appellate tribunal. This Court has stated that principle time and again in cases such as *Magnum Import Co.* v. *Coty,* 262 U.S. 159 (1923). In *Magnum,* the Court, of course, recognized its power to review cases by certiorari to the courts of appeals. The Court characterized the primary reasons for granting such review as ". . . to secure uniformity of decision between those courts in the nine circuits; and . . . to bring up cases involving questions of importance which it is in the public interest to have decided by this court of

last resort." 262 U.S. at 163. In the words of Mr. Chief Justice Taft,

> . . . The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. *Ibid.*

The principles of this Court as set forth, for example, in *Magnum,* have particular relevancy where there has been extensive fact finding in the lower courts and a petitioner then seeks to have this Court find to the contrary. Thus, in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271 (1949), the Court had before it detailed factual findings following a full trial in a patent case.* The Court in *Graver,* after citing Rule 52(a) of the Federal Rules of Civil Procedure, stated (at p. 275):

> . . . A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. [citing cases]

Petitioners cannot make any such showing in this case for the simple reason that no error has been made.

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* In the present case, petitioners themselves point out that the record made in bringing out "the Rayex story" was "comprehensive" (Pet. Br. 5); this merely echoed the earlier findings of the district court which referred to "this complete record" and "the extensive record herein" (R. 1684, 1697).

B. *None of the Criteria of This Court's Rule 19 Are Met.*

In seeking to persuade this Court to issue a writ of certiorari, petitioners have created four fanciful categories of alleged "conflicts" between the decisions in this case and those of the federal district and circuit courts, as well as with previous decisions of this Court. As has been previously demonstrated, these conflicts do not exist in fact. Petitioners' attempts to create such conflicts merely reflect their misunderstanding of the decisions below and a misconstruction of these holdings. Thus, the court of appeals did not hold "that a party, to secure relief from a preliminary injunction, must appeal or go to trial on the merits" (Pet. Br. 6, Reason (1)), nor "that a party, to secure relief from a preliminary injunction, could rely only upon 'changes in circumstances which occurred,' that is, facts which arose or came into being, 'after the injunction was entered,' and could not 'relitigate on a fuller record preliminary injunction issues already decided' " (Pet. Br. 6, Reason (2)). Certainly petitioners' failure to appeal from the original preliminary injunction played a significant part in the second district court opinion as well as in the court of appeals' decision herein. But that, of course, is perfectly proper. By such failure, petitioners took on a very substantial burden which they have not been able to discharge.

Petitioners' second reason is also otherwise inapposite. While the court of appeals was undoubtedly influenced by petitioners' concession that nothing had changed since the entry of the original preliminary injunction, the court specifically affirmed the district court's refusal to vacate the injunction (R. 1940). In so affirming, they endorsed the district court's language that:

> . . . Moreover, the remainder of defendants' arguments, rather than showing a change in conditions from the time the injunction was granted, merely rehashes, in far greater detail to be sure, most of the arguments previously presented to the Court and as such would appear to be improperly raised herein. However, even considering the offer of proof as properly before this Court, I am more fully convinced than before that there was no impropriety in the granting of the injunction. (R. 1688)

Accordingly, it is clear that while both lower courts found that petitioners were *entitled* to introduce whatever "newly presented evidence" they claimed to have found, those courts rejected petitioners' claims. The court of appeals' statement about relitigating matters already decided (R. 1940) was an admonition to petitioners. The *holding*, however, was that no reason to modify the injunction had been presented.

Petitioners' third imagined category of conflict relates to Section 43(a) of the Lanham Act. Once again, both courts interpreted Section 43(a) in precise accord with all of the decisions of the respective companion courts (see cases cited at pp. 6-7, *supra*). In view of this harmony with the decisions of other federal courts, there is no basis for sanctioning review of the lower courts' findings by way of granting a writ of certiorari.

Finally, petitioners claim that both the court of appeals and the district court have erroneously held "that defendants were in contempt for failing to do something which the injunction did not command it to do. . ." (Pet. Br. 7, Reason (4)). The detailed order which both of the courts found pe-

titioners to have violated was clear and precise. Little need be added to the specific refutation of petitioners' case in this regard (*supra*, pp. 20-21) and the district court's detailed and express findings on the contempt issue (R. 1670-86). The court of appeals phrased their approval as follows:

> . . . As to the contempt, there was ample support for the judge's finding that appellants' "conduct has been in blatant disregard of the . . . preliminary injunction." (R. 1940)

C. *An Interlocutory Decree Should Only Be Reviewed in an Extraordinary Case.*

Petitioners appear before this Court on the most tenuous of grounds. The order of the district court from which they seek relief (R. 1718-19) granted respondents' contempt motion and denied petitioners' cross-motion to vacate the original preliminary injunction order. In the usual situation, the entering of a contempt order is not even appealable. 6 *Moore's Federal Practice*, ¶54.17 at 154. Only by consolidating their cross-motion to vacate with respondents' contempt motion were petitioners even able to go as far as the court of appeals. Small wonder that the district court should have noted that petitioners' cross-motion constituted "**. . .** tactics which appear to have been designed to divert the Court's attention from the contempt issue." (R. 1684) The court of appeals also saw through petitioners' strategy when that court stated that petitioners "were merely trying to relitigate on a fuller record preliminary injunction issues already decided . . . ." (R. 1940)

Traditionally, this Court has avoided reviewing cases where interlocutory decrees are involved. This is an obvious

and logical principle of judicial review which should only be departed from in highly extraordinary situations. This rigorous standard was set forth, for example, in *American Constr. Co.* v. *Jacksonville, T. & K. W. Ry.*, 148 U.S. 372 (1892), where the Court, by Mr. Justice Gray, stated (at p. 384):

> . . . Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

Petitioners can surely not meet that standard. And in view of the further remedies and the full complement of trial procedures which may still be available to petitioners, their Petition certainly does not involve anything which is "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1944); *Land* v. *Dollar*, 330 U.S. 731, 734 (1946). Finally, this is not a case involving fatal jurisdictional defects or "an improvident exercise of judicial discretion." *Myers* v. *Bethlehem Shipbldg. Corp.*, 303 U.S. 41, 52 (1937).

In summary, therefore, there is no compelling reason why this Court should issue a writ of certiorari to review the prior decisions in this case. The order from which relief is sought is interlocutory and the case is not an "extraordinary" one.

D. *This Court Should Not Review a Case Which Affects Only the Litigants.*

Another canon under which this Court has traditionally operated is that it will not hear a case in which the outcome of such review will only bear upon the particular litigants appearing before the Court. The facts here are that petitioners are simply dissatisfied with the results of each of the three previous decisions in this case. They apparently feel that they have somehow received only arbitrary and unfair handling each of the three times they have been before the appropriate judicial body. This type of lament, reflecting straightforward dissatisfaction, whether soundly based or not, is too narrow a ground to permit review.

While this Court does not often articulate its reasons for refusing to issue a writ of certiorari, it has occasionally seen fit to do so. Such cases shed a good deal of light on the appropriate standards to be applied when considering petitions such as the one presently before the Court. Thus, in *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) (dismissing writ as improvidently granted), the standard was stated as follows (at p. 74):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

And at page 79 of the Opinion in *Rice*, Mr. Justice Frankfurter quoted the words of former Mr. Chief Justice Taft, speaking for a unanimous Court in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1922):

> . . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

The following sentence in the *Layne* opinion, which was not quoted by Mr. Justice Frankfurter, is perfectly applicable herein:

> . . . The present case certainly comes under neither head. (at p. 393)

CONCLUSION

There is no substantial reason why the Supreme Court of the United States should review this case by the issuance of a writ of certiorari. The decisions below are in complete harmony with the prior decisions of this Court and of the Federal Judicial Circuits and Districts. The "conflicts" suggested by petitioners do not exist. Moreover, the decisions herein have particular application and relevance only to the litigants; there is no compelling need for a decision by this Court since such a decision would have very limited impact on others.

In view of the complete propriety of the decisions below, there is no need to bring these decisions "into conformity with established law." (Pet. Br. 16) The Petition for a Writ

of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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